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REPORTS OF CASES

ADJUDGED IN THE
Court of King's Bench,
Since the *Death* of LORD RAYMOND;
In FOUR PARTS,

Distributed according to the Times of his four Successors,
LORD HARDWICKE, SIR WILLIAM LEE,
SIR DUDLEY RYDER, and LORD MANSFIELD.

By JAMES BURROW Esq;
*Master of the Crown-Office, and one of the Benchers of the
Honourable Society of the Inner Temple.*

With TWO TABLES,
One, of the NAMES of the CASES; the Other, of the MATTER
contained in them.

L O N D O N :

Printed by His Majesty's Law-Printers;

For Messrs. J. WORRALL and B. TOVEY, in *Bell-Yard,*
near *Lincoln's-Inn.*
MDCC LXXI.



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By JAMES BURROW Esq;

PART the FOURTH.

VOLUME the FIRST;

Beginning with *Michaelmas* Term 30 G. 2. 1756.

The SECOND EDITION: In which, the TABLE of the
PRINCIPAL MATTERS is much *enlarged*.

LONDON:

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M^dCCLXXI.



P R E F A C E.

IT may naturally be asked—"Why I publish *at all?*" "Why I begin from Lord RAYMOND's *Death*, rather than from any *prior Æra?*" "Why I have *postponed* the three former Parts of this Work; and published the *fourth* Part, *first?*" "Why I venture to print, without the Sanction of a *Licence*, to authenticate my Reports?"

IN ANSWER to the *first* Question.—

I found myself reduced to the Necessity of either *destroying* or *publishing* these Papers; (which were intended for my own private Use, and not for public Inspection.) For as it was become generally known "that I had taken *some* Account, (good or bad,) of "all the Cases which had occurred in the Court of "King's Bench for upwards of 40 Years", I was subject to continual Interruption and even Persecution, by incessant Applications for Searches into my Notes; for Transcripts of them; sometimes for the Note-books themselves, (not always returned without Trouble and Solicitation;) not to mention frequent Conversations upon very dry and unentertaining Subjects, which my Consulters were *paid* for considering, but I had no Sort of Concern in. This Inconvenience grew from bad to worse, till it became quite insupportable: And from thence arises the present Publication.

IN ANSWER to the *second* Question.—

My Notes taken *at the Bar*, previously to my becoming *Clerk of the Crown*, had no particular Claim to
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the least Degree of AUTHENTICITY :—Therefore I do not presume to expose *them* to public View. But when I entered upon that Office, I thereby came to have all the Records and Rule-books on the *Crown*-side of the Court in my own Power, and could inspect or transcribe them at Pleasure : Besides which, as I never after that Time stirred out of Court till it rose, I was sure to miss nothing that passed in it. Add to this, That I had *now*, by my Situation in the very Middle of the Court, better Convenience both of Hearing and Writing, than I had had at the Bar, in the outermost Rows. I then came to have also better Opportunities of procuring true States of the Cases on the *Civil* Side of the Court.

* Hilary
Vacation, 6
G. 2. 1732-3.
viz. Mr.
Bellamy, on
the 9th and
Lord Ray-
mond on the
18th of March.

LORD RAYMOND and my immediate Predecessor in Office happening both to die in the * same Vacation, I was sworn into my present Office as soon as the Court sat after Lord RAYMOND's Decease, viz. on the first Day of *Easter* Term 6 G. 2. 1733. LORD RAYMOND's *Death* seems therefore to be the fittest *Æra* from whence to begin ; and the rather, because his Lordship's *own* Reports (ending with *Trinity* Term 5^o & 6^o G. 2. 1732.) have been published since his Death.

* From
25th March
1733.
* 4 Geo. 2.
c. 26.

* At *this* Time also, the Garb of Common-law Pleadings was entirely changed, and modernized. * A Statute now took Place, for converting them from a fixed dead Language to a fluctuating living one ; and for altering the strong solid compact Hand (calculated to last for Ages) wherein they were used to be written, into a Species of Hand-writing so weak, flimsy and diffuse that (in Consequence and Corruption of this Statute, though undoubtedly contrary to it's Intention,) many a modern Record will hardly out-live it's Writer, and few perhaps will survive much above a Century.

In

IN ANSWER to the *third* Question.—

THERE are *many* Reasons which induced me to follow the Example set by the Publisher of Sir GEORGE CROKE'S Reports.*

* See Sir
Harcottle
Grimston's
Preface to
Cro. Car.

LATE Cases are most sought after : And therefore that Desire of being delivered from daily Importunity, which obliged me to publish, is a strong Motive to my publishing in *this* Order.

As my Reports can be of *no Authority*, Gentlemen may supply that Defect, where the Cases are so recent, from their *own* Notes : And my Book may be of Use as an *Index*.

By Beginning with *this* Part, (where many Gentlemen now alive can set me right,) I shall make an Experiment “ Whether my Faults and Mistakes are so great, as to make it advisable for me to suppress the “ Rest.”

I the rather begin with this Part, to prevent the Publication of worse and more inaccurate Notes. Some Encouragement to the most faulty might be expected, from the Impatience of the Profession, for Reports during this Period. And their Impatience is not to be wondered at. There never was more Business. The Reasoning and Opinions of the Judges never gave more Satisfaction. *All* the Seats were never so filled together. And (what never happened before, during a like Period,) since the *11th* Day of *November* 1756 to this Day, there never has appeared in Court the least Difference of Opinion : Every Rule, Order, Certificate and Judgment have been *unanimous*. The Books of Reports are so full of frequent Difference of Sentiments in the Court, (both hasty and deliberate,) that for *All* to
I agree

agree so long, through such an infinite Variety of Business, in every Conclusion upon every Question of every Kind, argues uncommon Knowledge, Capacity and Temper in *All*. The Authority of right Judgments, upon right Principles, given unanimously by Magistrates who *add* Weight and Dignity to the highest Offices, instead of *deriving* any from them, is so great, that the direct Point determined becomes a *RULE* for ever, and establishes *Certainty*, the Mother of Security and Peace.

The extraordinary Ability with which *every* Seat upon the Bench has been filled during this Period, has suffered nothing to *hang undecided*. A *new Plan of Dispatch* has brought every Matter *speedily* to a *Conclusion*; in Spite of the Parties themselves, their Counsel and Attornies; in Spite of mutual Dilatoriness, Negligence and Complaisance; in Spite of Artifice by that Side which finds an Interest in protracting; in Spite of every Contrivance which can be suggested to a Defendant who means only Delay.

Some hundred Causes end, every Year, at the Sitings, which are not heard of *in Court*, (For the Judgment is consequential, and of Course;) Many of them, within a few Months after their Commencement. Where there is a *special Case* or Verdict at the Sitings, it is dictated by the Court, and signed by the Counsel *before* the Jury is discharged. If, in settling it, any Difference arises about a *Fact*, the Opinion of the Jury is taken, and the Fact is stated accordingly: Whereas they *used* to be left to *future settling*; which often occasioned much Altercation and many Attendances before the Judge; sometimes, a new Trial, to fix a Fact; always, a great *Delay*. They must *now* be set down in the Paper, for Argument, within *four Days*; They must be argued in *Course*, as they stand: Altho' both Sides should *consent*; they cannot be put off, but for special and sufficient *Reasons* appearing by *Affidavit* (if

P R E F A C E

v

(if necessary,) and upon *Motion* made a Day or two before. Nothing stops on Account of the *Absence* of any of the Judges: Whereas nothing (of this Kind) used to come on, unless the Court was *full*.

The Judges being apprized of the Case and Question from their Paper-books, give Judgment, in many Cases, *immediately*, upon the *first* Argument; and refuse a *second*, unless they themselves think the Question *requires* more Examination. It very seldom happens that there are more than *two* Arguments: Whereas I remember three or four to have been common; and it was not thought proper, to refuse hearing a second, third, or even fourth Argument, if *either* Side pressed for it, though the Court themselves had no Doubt.

All Motions or Rules in Matters of *Length* or *Consequence* are appointed for *particular Days*, and called on *first*: Whereas they used to take their *Chance* of being moved by Counsel in their Turn; and thereby were often kept back till the last Day of the Term, and then (for Want of Time) necessarily put off to the *next Term*, and so on (with good Management) from Term to Term.

Besides these *special* Appointments, *all enlarged* Rules must come on, peremptorily, during the *first Week* of the Term.

There are *more* OPINIONS of the *Court*, during this Period, upon *important* Points, than ever were given during the like Number of Years: And I do not remember a single Instance where the Determination did not give general Satisfaction. In every Case which the Anxiety of Parties has carried to the House of Lords, it has been *unanimously affirmed*.

SIR JOHN STRANGE was obliged to omit many of the best and most interesting Arguments; because they were in Causes *not adjudged*, and therefore of no Use to the Public: But during *this* Period, that Reason does not hold for omitting such Arguments *closed*. And among the Questions decided, there are some that had lasted *very long* indeed.

* Pref. to
Cro. Car.

As the Public are *already* possessed of SIR JOHN STRANGE'S Reports, comprehending *all* my *first*, and a great Part of my *second* Period, THAT is another Reason inducing me to publish mine in the Order I have chosen: Though I think the Authority of SIR HAREBOTLE GRIMSTON, and the Reasons he * urges, are *alone* sufficient to justify it.

IN ANSWER to the *fourth* Question.—

THIS Difficulty alarms me *most*.

2?

I know it is a Contempt of *this* Court to publish their Proceedings: It is against a standing Order of the House of Lords to publish Proceedings there, upon Appeals or Writs of Error. They ought to be published under *authoritative* Care and Inspection: But SINCE the *Year-books*, no judicial Proceedings have been so published, either by the House of Lords, or by any Court in *Westminster-Hall*, except State-Trials.

LICENCES by the Chancellor and Judges proceed upon the Character of the Reporter *only*; without saying a Word of the *Work* itself, or that the Licensers ever *saw* it. Such Licences (to allow and approve of the printing and publishing) took their *Rise* from the Necessity of a Licence to print, as the Law *formerly* stood; and have *continued* in the *same* Form of Words (without any Meaning,) *since* the *Reason* of them has *ceased*.

I have

I have been assured, that some now possessed of judicial Offices have declared “ They *never would* sign one ; because it hangs out false Colours, and misleads those who think it gives the least Approbation or Authority to the Work.”

SUCH a Licence, could it have been obtained, would still have left my REPORTS to stand upon their *own* merit : And I flatter myself that I am too well known in *Westminster-Hall*, to want a Testimonial to my CHARACTER.

I had not the Impudence to *attempt* getting an Approbation of the Work. It is impossible that the *Judges* should find the Time or take the Trouble to revise it ; or that they would do it, upon any Application whatsoever. (Which makes it the more to be lamented that the Usage of Year-books hath ceased.)

UPON *these* Considerations, I have ventured to follow the Example of *Mr. Justice FOSTER*, and to publish my Notes WITHOUT *any* Leave or Licence.

There are many Instances where Men who have published Matter relative to a Cause *depending*, or *soon* after it was over, have been punished as guilty of a Contempt ; most justly and wisely, for many Reasons : But a Publication of Reports at a *Distance of Time*, merely as Matter of *Science*, has not been animadverted upon ; though within the *Letter* of the Law. Where they have been published *surreptitiously*, without Consent of the Reporter, the Printers have been proceeded against *civilly* upon the Foundation of his Property ; but *not criminally* : And after the surreptitious Edition has been stopped by an Injunction, the Book has been published,

2

with

with Consent of the Reporter, *without* Leave or Licence; and no *Notice* taken, or *Complaint* made of it.

I trust my Excuse, (as Mr. Justice *Foster* did) to my INTENTION. If I find I have done wrong, or that I give Offence, I will certainly put a *Stop* to *this* Part, and *suppress* the *other three*.

The Work must make it's *own* Way in the Profession. It's Merit consists in the Correctness of the *States* of the Cases. In *this* Respect, it must be of *some* Use; especially when compared with other Notes. In all *other* Respects, I know it is very faulty: And I do most humbly beg Pardon of the *Bar*, and much more of the BENCH, for innumerable Injuries I must have done them, as to Language and Argument. I do not take my Notes in Short-hand. I do not always take down the *Restrictions* with which the Speaker may *qualify* a Proposition, to guard against it's being understood universally, or in too large a Sense. And therefore I caution the Reader, always to *imply* the Exceptions which ought to be made, when I report such Propositions as falling from the Judges. I watch the *Sense*, rather than the *Words*; and therefore may often use some of my own. If I chance not to understand the Subject, I can then only attend to the *Words*; and must, in *such* Cases, be liable to Mistakes. If I do not happen to know the Authorities shortly alluded to, I must be at a Loss to comprehend (so as to take down with Accuracy and Precision) the *Use* made of them. Unavoidable Inattention and Interruptions must occasion Chasms, Want of Connexion, and Confusion in many Parts of my Notes: which must be patched up and tied together as well as one can, by Memory, Guess or Invention; or those Passages totally struck out, which are so inexplicably puzzled, that no Glimpse of their Meaning remains to be seen.

I am

I am thoroughly aware of all these Faults. I am conscious too, that not having had the good Fortune of acquiring that Knowledge in the Science of the Law, which is gotten only by a lucrative Experience at the Bar, (from which I was very early removed;) and not being blessed with the quickest natural Parts, I may have misapprehended Topics and Allusions; I may have made Blunders in the Sense, by endeavouring to rectify those of my Pen. *These* are Imperfections which Diligence could not cure. I am only concerned, lest my Errors should be imputed, not to myself, but to those whose Discourses I may happen (through my own Infirmities) to misrepresent,

Therefore let me, once for all, caution the Reader, especially the young Student: I pledge my Credit and Character, ONLY “that the *Case* and *Judgment*, and “the *Out-lines* of the Ground or Reason of Decision “are right.” As to the *Rest*—I took the Notes, for my own Amusement and Use, as correctly as I was able: where the Matter or Manner is liable to Objection, It may probably have arisen from my Mistake.

I have *omitted* all Cases where the Question turned upon FACTS and EVIDENCE *only*; or where the Order followed almost of *Course*, in Consequence of Maxims fully settled; or was *not contested*.

I have *omitted* common *Sentences* in ordinary criminal Prosecutions; and, in short, every thing which I thought could not be of general Use: (though I took Notes of all these.)

Before I conclude, I must again entreat the Indulgence and Forgiveness of the *Bar*, and still more, of the BENCH, for the wrong I may have done them.

If the Candid and Judicious shall give a favourable Reception to *this* Part, it will encourage me to finish my Design, and publish the preceding Periods.

INNER TEMPLE,
29th November 1765.

JAMES BURROW.

ADVERTISE-

ADVERTISEMENT.

THE BODY of this Book is calculated for such as may be inclined to look into it at their Leisure : The ABRIDGMENT, for such as desire only a *Summary* Account of the Determinations.

The FORMER is therefore designedly *copious* : For,
“ * IMPERFECT Reports of Facts and Circumstances, * See Mr.
“ especially in Cases where *every* Circumstance weigh- Justice Fo-
“ eth *Something* in the Scale of Justice, are the Bane ster's Dif-
“ of all Science that dependeth upon the Precedents courses on the
“ and Examples of former Times.” Crown-Law,
pa. 294.

The LATTER was meant to be as *concise* as the Nature of a *complete* Abridgment would bear.

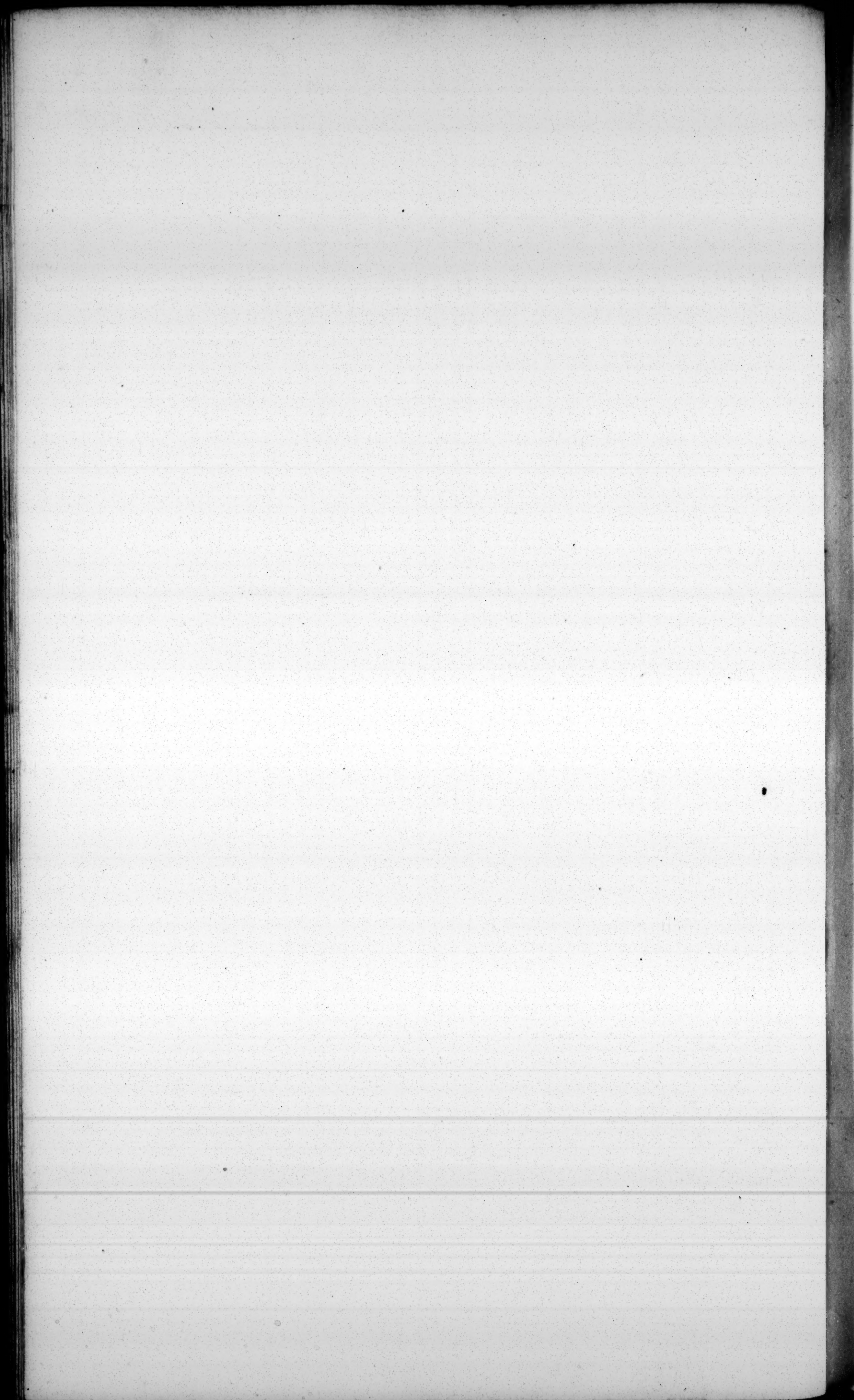
It is hoped, that Nothing very trifling is *inserted* in the *One* ; Nor any Thing very material *omitted* in the *Other*.

MEMORANDUM.

The TABLE of the *Principal Matters*, or *Abridgment* of the *Cases* contained in this first Volume, is very much *enlarged*, in this *second* Edition of it.

In the former Edition, it bore the following Title—“ A *Short* REFERENCE to the *Principal Matters* contained in it.” 'Tis now a *full Abridgment* : And therefore it would have been improper to *continue* to call it “ A *Short Reference*.” The Difference will appear, by Comparing the Articles of the two Editions with Each Other ; as “ *Bail, Bank-Notes, Bankrupts, Baron and Feme, Bishops, Common Recovery, Declaration, Demurrer, Devise,*” and other Titles, as far as Letter L. The *subsequent* Titles were copious enough, in the *Old* Edition.

The *Abridgments* of the SETTLEMENT-Cases remain in the *Table*, under Title “ *Orders of Removal*” : But it would have unnecessarily enlarged the Bulk of this Edition, to have repeated them at Length, in the Body of it, when they (together with many *others* preceding and succeeding them) are now printed by themselves, in a separate *Quarto* Edition.



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Michaelmas Term

30 Geo. 2. 1756.

The Court of KING's BENCH

(When it became complete, on the 3d Day of the Term, as below,) was composed of

- (a) *Lord Mansfield,*
- (b) *Sir Thomas Denison,*
- (c) *Sir Michael Foster, and*
- (d) *Sir John Eardley Wilmot.*

(a) His *Lordship* was sworn in, upon the 8th of *November* 1756: And took his Seat upon the Bench, on the 11th of the same Month.

(b) Mr. Justice *Denison* was sworn in, upon the 11th of *February* 1741: and took his Seat, the next Day.

(c) Mr. Justice *Foster* was sworn in, upon the 22d of *April* 1745: And took his Seat, upon the 1st of *May* following, (being the first Day of *Easter* Term 1745.)

(d) Mr. Justice *Wilmot* was sworn in, upon the 11th of *February* 1755: and took his Seat upon the Bench, the next Day.

Michaelmas Term 1756. 30 Geo. 2. B. R.

Monday 8th November 1756.

His Majesty's Attorney General, the Honourable *William Murray*, was, this Morning, called Serjeant; and about eight in the Evening, was sworn in Lord Chief Justice of this Court, (in the Room of the late Lord Chief Justice, Sir *Dudley Ryder*, who died on 25th May 1756) before the Lord Chancellor (the Earl of *Hardwicke*,) at his House in *Great Ormond-street*, in the Presence of the three Judges and of most of the Officers of the Court of King's Bench.

His Lordship took the Oaths of Allegiance and Supremacy on his Knee; and the Oath of Office, standing. Immediately afterwards, the Great Seal was put to a Patent, which had before passed all the proper Offices, creating his Lordship BARON of MANSFIELD in the County of *Nottingham*, to Him and the Heirs Male of his Body.

Thursday 11th November 1756. Lord *Mansfield* took his Place, as Lord Chief Justice.

*Friday 12th
November
1756.*

Raynard versus Chace.

THIS was an Action of Debt for a Penalty on 5 *Eliz. c. 4.* for exercising the *Trade of a BREWER*, without having served an Apprenticeship. In the Declaration there were two Counts. To the former "*nil debet*" was pleaded: And there was a general Verdict for the Defendant; (*viz.* "That the Defendant does not owe, &c.") But on the 2d Count there was a Special Verdict: Which was to the following Effect; *viz.* that the Defendant *Chase* and one *Coxe*, were, and have been, during

ring all the Time charged in this Count, Partners in the Trade; and that the Trade was carried on, and has been for 4 Years carried on, in their *joint* Names; that *Coxe* did serve an Apprenticeship, &c; but *Chase* never did; and that *Coxe* is a *working Brewer*, and was paid a Salary for his Labour; which Salary was always deducted, and allowed to him, *previous* to a Division of the Profits; and the Entries at the Excise-office were in their *joint* Names: But that the Defendant *John Chase* NEVER exercised the Trade HIMSELF; (which was wholly managed and carried on by *Coxe*;) but *only shared the Profits*, and *stood the Risques* of the Partnership. And they find it to be a Trade within 5 *Eliz. c. 4.*

Question, on 5 *Eliz. c. 4. § 31.* “Whether the Defendant *John Chase* is within the Act, upon this special Finding”.

Mr. Morton *pro Quer’.*

This Attempt to evade the Force of the Act by the Scheme of a PARTNERSHIP *with a qualified* Trader, would intirely frustrate the *Intention*, and is directly contrary to the *Words* of the Act.

The short of this Case is,—*Chase not being HIMSELF qualified*, takes a PARTNER *who is qualified*: which qualified Partner is the only *acting* Person in carrying on the Trade; and *Chase never interfered* in it.

There was the like Point before the Court in *P. 18 G. 2. B. R. Rex v. Driffeld.*

But, *per Denison and Foster* Justices, that Case was never determined: it went off upon an Objection to the Jurisdiction.

Morton: — But the Lord Ch. J. *Lee* then said, “that he had never known a Person exempted from the Statute, who had not served an Apprenticeship.”

And as to his not interfering in the Trade, the Case of *Hobbs qui tam*, &c, *vers. Young*, reported in 2 *Salk.* 610. and in *Carthew* 162. and in 3 *Mod.* 313. is a Determination in point, and not to be distinguished from the present Case.

Therefore he prayed Judgment for the Plaintiff.

Mr. *Bishop contra, pro Defend’*, said, he would first consider how this matter stood *before the Statute*, with regard to the free and unlimited Right that every Man naturally and legally had, of exercising whatever Trade he pleased; 2dly, The *Constructions* that have been

been *favourably* made upon it, in *Extention* of the Qualifications to exercise Trade; and 3^{dly}, Distinguish this Case from the Cases cited.

And first, The Liberty of Trade is a natural and Common-law Right; and was long unrestrained. The Statute of 37 E. 3. c. 5. which *first restrained* it, was very soon *repealed* by 38 Ed. 3. c. 2. And Lord Coke in 4 Inst. 31. says, "That *such* Acts of Parliament never live long." He cited the Case in 2 Bullstr. 186. *Dominus Rex and Allen Plaintiffs*, against *Tooley, Defendant*, as an Authority for him, tho' the Court did not indeed formally pronounce any final Judgment therein: And he also cited 11 Co. 53. the Case of the Taylors of *Ipswich*. Secondly, The before mentioned Case in 2 Bullstr. 186. *The King and Allen v. Tooley*, proves the Constructions to have been favourable. *Jenk. Cent. case* 15. *pa.* 284. "A private Brewer is not within the Statute." *Keilwey* 96. *pl.* 6 proves that the Statute ought to be taken strictly; being penal, and in Derogation of the Common Law. And Judges have dispensed with the Rigor of it: As in *Froth's Case*, 1 Salk. 67. where 7 Years Apprenticeship beyond Sea, though without binding, was holden sufficient. So *Queen v. Maddox*, 2 Salk. 613. *S. P.* accordingly: And the Court there call this Statute of the 5th of *Eliz.* a hard Law. *Comberb.* 254. *Rex v. Celler: per Eyre Justice*, One Brother living with another 7 Years (at the Trade of a Tallow-chandler) though not bound, may set up the Trade. 1 Mod. 26. *pl.* 69. *Dominus Rex v. Tarnith*, proves too that this Statute ought not to be extended further than Necessity requires.

Now it is not found by the present Special Verdict, in the Affirmative, "That this Man has occupied, used and exercised the Trade:" But it is found, (on the contrary,) negatively, "That he has NOT *interfered* in it; but it was wholly carried on by *Coxe*." And *Hob.* 298. says the Rule is, "That Affirmatives in Statutes that introduce new Laws, imply a Negative, &c." However, here is an *express* Negative.

Thirdly, with regard to the Cases cited.—

As to *Rex v. Driffeld*, whatever was found in the Affirmative in that Case, is found in the Negative here. And as to the Case of *Hobbs v. Young*, there was *no Partner* skilful in the Trade; but only *Servants*: Whereas here, is a skilful Partner to conduct it; and the Servants are employed and set to work *BY this Partner*, who is skilful; and are *not* employed and set on work *by* the Defendant.

Then he added, (4thly,) some Arguments *ab inconvenienti*.

First, This will affect all great Undertakings: for it seldom happens, in such great Undertakings, that *all* the Partners are duly qualified,

qualified, in Strictness. So likewise, it would affect all Cases where *Infants* and *Trustees* are intitled to Shares of profitable Trades. So, where *Creditors* have Shares in them.

And *Apprenticeships*, in great *Breweries*, are not, in Fact, usual or customary.

Mr. *Morton*, in Reply, premised, that the Rule of Construction upon this Act must be *uniform*, with regard to *all* the Trades within it: And *Breweries* cannot be distinguished from the rest.

In answer to Mr. *Bishop's* Argument, He observed,

1st, It is of no Importance what was the Right before the Statute: The Statute was made, *expressly*, to RESTRAIN such Right in future, for the Good of the Public.

2dly, He said, He did not want to *extend* this Law: this Case is fully and completely *within* it, without straining it at all. And the Constructions that Mr. *Bishop* calls favourable, in the Instances which he has cited, are no more than just and reasonable upon the Circumstances of the respective Cases in which they were made.

3dly, As to the NEGATIVE-Finding in the present Case, it amounts to no more than "that this Man did *not Mind his Business*;" (which the other Partner did.)

And as to setting to work, it is plain that *Coxe* is set to work by *Chase*: and, *virtually*, He sets all the Servants to work. Indeed, *Coxe* is here both a Journeyman and a Partner to *Chase*: For *Chase* pays him as a Journeyman; and, besides that, give him a Share of the Profits. And my Lord Ch. J. *Holt's* Opinion in the Case of *Hobbs* and *Young* is quite applicable to the present Case.

4thly, He endeavoured to shew that the construing this Man to be within the Penalty of the Statute, could not be attended with any sort of Inconvenience.

Therefore He prayed Judgment for the Plaintiff.

As this was the first Argument, it was expected (as of Course) that it would be argued again: But Lord *Mansfield* gave his Opinion immediately, to the following Effect.

Lord *Mansfield*. Where We have no Doubt, We ought not to put the Parties to the Delay and Expence of a farther Argument; nor leave other Persons who may be interested in the Determination of a Point so general, unnecessarily under the Anxiety of Suspence.

C

The

The Defendant is to share the Profits with *Coxe*, in Moieties ; and is liable to the Debts of the Partnership : But it is *positively and expressly* found, " That during all the Time charged, He NEVER ACTED *in or* EXERCISED *the Trade.*" He was not, by the *Terms* of his Agreement, to Act in the Trade : The *Other* Partner was to do the Whole, and had a particular Salary on that Account. It is not found that either *Coxe* or any Servant under him was set to work by CHASE ; nor that *Chase* did *any Act* whatever of exercising the Trade : He was only concerned in the *Profit*.

Now though this may be, to *SOME Purposes*, exercising a Trade, in respect of third Persons who deal with the Partnership as *Creditors*, and within the Meaning of the *Statutes concerning Bankrupts* ; yet the present Question is, " Whether it be exercising a Trade, " CONTRARY TO THIS ACT."

I think Mr. *Bishop* has laid his Foundations right, against extending the penal Prohibition beyond the express Letter of the Statute.

1st, This is a *penal* Law ;

2dly, It is in *Restraint of natural* Right ; And

3dly, It is *contrary to the general* Right given by the *Common Law* of this Kingdom : I will add

4thly, The *Policy*, upon which the Act was made, is, from *Experience*, become doubtful.—Bad and unskilful Workmen are rarely prosecuted

This Act was made early in the Reign of Queen *Elizabeth*. Afterwards, when the great Number of Manufacturers who took Refuge in *England* from the Duke *D'Alva's* Persecution, had brought Trade and Commerce with them and enlarged our Notions, the Restraint introduced by this Law was thought so *unfavourable*, that in 33 *Eliz.* in the Exchequer, 4 *Leon. 9. pl. 39.* it was construed away : For it was holden clearly, by the Judges, in that Case, (which Construction, however, I take *not* to be law *now*,) that " if One " hath been an Apprentice for 7 Years at *any* One Trade mentioned within the said Statute, he may exercise ANY Trade named " in it, though he hath *not* been an Apprentice to IT."

All these Observations only shew " That this Act, as to what enforces the *Penalty* of it, ought to be taken *strictly.*" And accordingly, the Constructions made by former Judges have been favourable to the Qualifications of the Persons attacked for exercising

ing the Trade; even where they have not *actually* served Apprenticeships. They have, by a liberal Interpretation, *extended the Qualifications* for exercising the Trade, *much beyond* the Letter of the Act; and have *confined the Penalty and Prohibition* to Cases *precisely within* the express Letter.

Let Us consider whether the *present* Case be within the *Letter*, or even the *Meaning* of this Act.

The *General Policy* of the Act was to have Trades carried on, by Persons who had *Skill* in them.

Now here, the *personal* Skill of the Defendant makes no *real* Difference in the Case. For the Person who is skilful, *acts every* Thing, and *receives no Directions* from this Man: He neither did, nor was to interfere.

The Case of *Hobbs and Young* is not parallel. There, the Defendant, a *single* Man, directed the whole Trade; was the *Master*; and *directed All* the Servants. *As between Master and Servant*, no doubt, it is the *Master*, who carries on the Trade; and *not the Servant*. But in *Hobbs and Young* there was *no Partnership*; nor (what is the distinguishing Character of the present Case) a *mere naked* sharing of the Profits, and risking a Proportion of the Loss; without his acting or directing at all, in any Manner whatsoever.

In many considerable Undertakings, it is absolutely necessary to take in Persons as Partners, to share the Profits and risque the Loss. And the general Usage and Practice of Mankind, ought to have Weight in Determinations of this Sort, affecting Trade and Commerce, and the Manner of carrying them on.

It is notorious that many Partnerships are entered into, upon the Foundation of one Partner contributing Industry and Skill, and the other, Money.

Many great Breweries and other Trades have been carried on for the Benefit of Infants and Residuary Legatees, under the Direction of the Court of Chancery.

Now if the Plaintiff's Construction was to hold, the whole Direction and Decree of the Court of Chancery was contrary to Law and to an express Act of Parliament.

So it is likewise practised in *other* great Trades. The late Mr. *Child* directed his Business of a *Banker*, to be carried on for the Benefit of his Children and other Persons.—Many other Instances might be mentioned.

It

It would introduce the utmost Confusion in Affairs of Trade and Commerce, if this Construction should prevail.

On the *other* Hand, I see no Inconvenience: It is *exactly* the same Thing as to the Trade, in every *lōta*, “whether this Partner
“has or has not served an Apprenticeship.”

Therefore I think the Defendant *not* liable to the *Penalty* of
5 *Eliz.*

Mr. Just. *Denison* said, That this was a new Case.

For though the Cases of *Rex v. Driffeld*, and *Adcock v. Gell*, were indeed before the Court, yet *no Opinion* was delivered in either of those Cases.

He concurred that it was *not* an *Exercise* of the Trade *within*
5 *Eliz.*

The true Intent of that Act was, That no Man should *exercise* any of those Trades, unless He had *Skill* in them. It has never been extended, by any liberal Construction of it, in Point of enforcing the *Penalty*.

And the present Question is, “Whether this Man has *exercised*
“the Trade, within the Meaning of it; so as to be *liable to the*
“PENALTY.”

Now it is here found, “That He *never* did *interfere* in the
“Trade, *Himself*.” In the Case of *Hobbs v. Young*, the Defendant was the *Super-Intender* of the work; and *did exercise* the Trade, without having any Skill in it.—And *this* is the *Point in Question*, and the principal Determination, in that Case of *Hobbs v. Young*; whatever else might drop from the Judges in giving their Opinion. But *here*, the Defendant *never meddles at all*; but leaves *all the Management* to a Partner, who had Skill: He himself *never acted*, in carrying on the Trade.

It may be said indeed, “that *Chase* is liable to the *Statutes of*
“*Bankrupts*.”—True: But the Construction of *those* Acts, made for the Benefit of the Bankrupt’s Creditors, is very different from the Construction of this *prohibitory* and *penal* Act; which ought to receive a *strict* Construction, in Point of extending the *Penalty*.

Therefore, for these Reasons, and those given by the Lord Ch. Just. He held “That this was *not* an *exercising* the Trade *within*
“the Act.”

Mr. Just. *Foster* concurred; and said, He had prepared Himself to give his Reasons *at large*: But as the Lord Chief Justice had gone through them so fully, and inforced them in so clear and satisfactory a Manner, He would only, *in general*, declare his Concurrence.

Mr. Just. *Wilmot* was of the same Opinion.

By the Court unanimously Judgment was given for the Defendant.

REGULA GENERALIS.

THE Court declared, That all *enlarged Rules* to shew Cause, which were made in the last Term, should be moved *before the last Week* of the present Term; *Unless Leave* for postponing them should be particularly applied for, and granted: And this Rule to prevail hereafter, in all future Terms, in the same Manner.

Monday 15th November 1756. Lord *Mansfield* took the Oaths: He was (as is usual) sworn first and *alone*.

Roades *versus* Barnes.

Tuesday 16th
November
1756.

THIS was a Plea of a *stated Account*, pleaded to an Action upon *Simple Contract*; To which Plea there was a bad Replication, and a Demurrer to that Replication: Consequently, the Question was only upon the Validity of the *Plea*.

After a long Argument for the Defendant in support of the Plea, The Court, without hearing the other Side, held the Plea *bad in Substance*: And so, they said, it had been determined in this Court, last *Hilary Term*, in a Case of *Atherly v. Evans*. A promissory Note cannot be pleaded in Bar to an Action upon Simple Contract: Though a *Bond* may, because it extinguishes the Debt. One Bond cannot be pleaded to an Action brought upon another Bond.

Judgment for the Plaintiff.

D

Rex

Wednesday
17th November
1756.

Rex *vers.* Fonseca.

MR. Norton, on Behalf of the Prosecutor, shewed Cause against discharging the Defendant's Recognizance.

This was a Recognizance entered into by the *Defendant* and two other Persons, upon his removing this Indictment (which was for an Assault with intent to ravish) from *Hick's Hall*, where it was originally found.

The Defendant had been tried, convicted, and fined in this Court; and had paid his Fine.

After which, Mr. *Morton* had moved to discharge the Defendant's Recognizance; it being a Recognizance at *Common Law*, and all the Terms of it having been complied with. For he insisted,

1st, That it is not within the Statute of 5 & 6 W. & M. c. 11. § 2. being from the Court of *Oyer and Terminer*, not from the Sessions: And this Statute relates only to Indictments found *at the Sessions*.

2dly, That the *Principal* is here bound, as well as the Securities: Therefore also, it is not within the said Act: which requires only Two Manucaptors, *without* the Principal.

3dly, The *Sum* is also different: For it is not a Recognizance in 20*l.* but in 100*l.* Himself, and each Security 50*l.* Therefore for this Reason too, it is not within the said Act. In Proof of which, he cited 2 *Salk.* 564. *Regina v. Ewer*; where a *Scire facias* was brought on a Recognizance taken before a Judge, upon granting a *Certiorari* to remove an Indictment from the Sessions of the Peace, in the Sum of 40*l.* whereas the Sum prescribed by the Statute, is 20*l.* And Lord Ch. J. *Holt*, held this Recognizance to be good at Common Law; but not to be a Recognizance according to this Statute.

M. 15 G. 2. B. R. Rex v. Sidney, was also cited and relied upon by Him, as in Point to the present Case.

In answer to which, Mr. *Norton* urged,

1st, That the Court at *Hick's Hall* is both a Court of *Oyer and Terminer*, and ALSO a Court of *Quarter Sessions*. And as to the

2d and 3d Objections. The Defendant has availed himself of this Recognizance; and has, *upon it*, removed the Record: And therefore he ought to be bound by it, *as by* a proper Recognizance.

And *Sidney's Case* was, He said, upon different Circumstances.

Here, he is not to depart the Court WITHOUT LEAVE: Therefore the Court will first oblige Him to do Us Justice, and pay the *Costs*, in the same Manner *as if* the Recognizance had been *regularly* taken under this Act.

N. B. The Sessions at *Hick's Hall* sit in *both* Capacities, *viz.* of Sessions of the Peace, and also of *Oyer and Terminer*; and they draw up their Orders with the *One* Title, *or* with the *other*, according to the DEGREE of the offence; (*viz.* Common Assaults, and Offences of a low Nature, under the Title of a Court of *Sessions*, and Assaults with Intent to ravish, Riots, &c, and Offences of a high Nature, under the Title of a Court of *Oyer and Terminer*;) And the *Certiorari's* are directed accordingly. And the present *Certiorari* was directed to them As a Court of *Oyer and Terminer*.

The Court looked upon the Case of *Rex v. Sidney* to be in Point:

And accordingly, Mr. *Morton's* Rule for discharging the Defendant's Recognizance, was made absolute. *

* *V. Post. pa.*
Rex v Lyon,
13th February
1764.

Macrow *vers.* Hull.

THE Defendant's Council shewed Cause against the Court's granting a new Trial upon payment of Costs; which had been moved for, by the plaintiff's Council, upon the Foot of the Verdict's being *against Evidence*: (Which Verdict was for the *Defendant*; and, consequently, the Application to set it aside, had been made on the Part of the Plaintiff.)

Mr. Just. *Foster* (who tried the Cause) reported it to be an Action of Trespass, *extremely frivolous*; but sufficiently proved. He said that the Defence was a very strong One indeed, in *Mitigation of Damages*; but yet was NOT a *sufficient Denial of the Trespass*: so that, in Strictness, the Verdict was undoubtedly against Evidence. However, he thought the Action *so trifling, frivolous, and vexatious*, that he should have thought Sixpence Damages to have been enough.

I

Whereupon

Whereupon The Court held, that, NOTWITHSTANDING *it's being a Verdict AGAINST Evidence*, (which in general is a good Reason for setting aside a Verdict and granting a new Trial,) yet the Action appearing, in *this Case*, to be *frivolous, trifling, and vexatious*, and the REAL Damages little or none, they ought to refuse, and accordingly did refuse to set aside the Verdict: And

Lord Mansfield added that it would even be a Cruelty to the Plaintiff, to grant his Motion; As he must pay the Costs of the former Trial, if he should prevail in it; and yet could hope for such very small Damages upon a new One.

Rule discharged. *Vide Post*, pa. 54. *Farewell v. Chaffey*, S. P. accord'.

Thursday 18th
November
1756.

Harrison Knt. Chamberlain of London *vers.* Godman.

MR. Serjeant Poole and Mr. Eliab Harvey shewed Cause against the issuing of a *Procedendo* in this Cause.

It came into this Court, upon the Return of a *Habeas Corpus cum Causa*, directed to the Mayor, Aldermen and Sheriffs of London, commanding them to bring up the Body of the Defendant, together with the Cause, &c.

The Return was to the following Effect, *viz.* That there is a Custom in London, “ that if any *ancient Custom, hard and defective* “ in any Thing *newly arising*, wants Amendment, the Mayor and “ Aldermen, with the Consent of the Commonalty, have always, “ &c, *appointed fit Remedy*, for the Common Good of the Citizens: “ So as such their Ordinances be consonant to Faith and Reason, “ and in no wise prejudicial to the King or his People, nor repug- “ nant to the Laws or Statutes of *England*.” And that the Customs of London are confirmed by Act of Parliament, 7 R. 2.

They then certify, that there is within the City of London, a Company of *Butchers*; and that at a Common Council holden on the 27th of June 20 G. 2. the Lord Mayor, Aldermen and Common Council made an Ordinance, “ That whereas many Per- “ sons who *exercise the Trade of Butchers*, have obtained *Freedoms* “ of OTHER Companies, by Redemption or otherwise; by Reason “ whereof the Company of *Butchers* is much *diminished and fallen* “ into Decay; For Remedy THEREOF, It is Ordained That every “ Person, not being already free of the City, occupying, using or “ exercising, or who shall occupy, use or *exercise the art, Trade* “ or *Mystery of a Butcher* within the said City or its Liberties, shall “ take

“ take upon Himself the Freedom of the COMPANY of Butchers ;
 “ and that no Person now using, or who shall hereafter use or exer-
 “ cise the Trade of a Butcher within the said City or Liberties,
 “ shall be admitted into the Freedom of the said City, by the
 “ Chamberlain thereof, of or in any OTHER Company than the said
 “ Company of Butchers: Provided always That every Person not
 “ being already free of the said City, who are or shall be intitled to
 “ Freedom of any OTHER Company by Patrimony or Service, shall
 “ be ADMITTED into THIS Company of Butchers, upon payment
 “ of a like Fine and Fees as are usually paid upon Admission of a
 “ Child or Apprentice.”

And that it was then and there further enacted, “ That if any
 “ Person or Persons, (except such as are already free, &c,) shall
 “ use the Trade of a Butcher, not being free of THIS Company of
 “ Butchers, He, &c, shall pay 5 l.” And Directions are given how
 the Penalty of 5 l. shall be levied, and also concerning Costs.

They then further certify “ That the Defendant was taken, on
 “ an Action brought against him in the Mayor’s Court of London,
 “ for the Penalty of this By-Law.”

Upon this Return, Mr. Williams, on Behalf of the Plaintiff in
 the Mayor’s Court, had moved for a *Procedendo*.

Mr. Serjeant Pool and Mr. Eliab Harvey, of Counsel for the De-
 fendant, objected to this By-Law, as being a bad one: And they
 principally relied on the following Objection to it; viz. “ That it
 “ was a By-Law in RESTRAINT of Trade; and therefore could
 “ not be good, WITHOUT setting forth a SPECIAL and PARTI-
 “ CULAR Custom to support it;” Which is NOT done by the present
 Return. And they argued, that this By-Law is by no Means sup-
 ported by the Authority which is set forth in the Return, as it’s
 Foundation; viz. “ A Custom to apply fit Remedy for the Com-
 “ mon Good of the Citizens, where any ancient Custom, hard and
 “ defective in any Thing newly arising, wants Amendment:” For
 neither is here any such ancient Custom set forth, and specified,
 which wanted Amendment; nor any hardship or Defect stated;
 Nor is there any Pretence to say that this is “ a Matter newly ari-
 “ sing;” Nor does the Return so much as even alledge, either that
 there was any such ancient Custom wanting Amendment, or any
 Hardship or Defect, or that the Subject of this By-Law was a Mat-
 ter newly arisen.

The Cases adduced by Each of them in Proof of their Positions,
 were as follow :

E

That

That it is a bad By-Law, and void, as being in RESTRAINT of Trade, appears by *Wagner's Case*, 8 Co. 125. a. b.

Therefore it is bad, without a Custom to support it. *Ibid.* in Point.

Yet NO Custom is here returned, for Support of any Restraint of Trade at all: And therefore the Court cannot take Notice that there is any such Custom. 2 *Strange* 1187. *Sir John Hartop v. Hoare & al.* The Court could not judicially take Notice "that every Shop in London is a Market Overt;" that Custom not being found nor stated. 1 *Strange* 187. *Argyl v. Hunt* (there cited) is in Point, to the same purport. 5 *Mod.* 108. *Robinson v. Gros court* is in Point with the present Case. *Carthew* 75. *Watson v. Clerke*. The Court cannot, *ex Officio*, take Notice of the Customs of London. *Salk.* 125. *Hodges v. Steward*, the fourth Resolution, is very strong to the same Purport. And *Co. Lit.* 175. b. proves the same Position.

Now here, though the general Custom "to make By-Laws" is set out; yet, the particular Custom "to make such a By-Law as this is, in Restraint of Trade," is NOT set out.

As to the Case of *Wannel v. Camerar' Civit' London*, in 1 *Strange* 675. There the particular Custom was set forth, as appears upon searching the Record of that Case: (Though it has been called, As cited from Sir J. S. a Case in Point.) In *Sir T. Raym.* 289. *Player v. Vere*, The By-Law made for the better and more regular Ordering of Cars and Carts, was holden to be good: But in 1 *Ro. Abr.* 364. pl. 5. (enter *Payne v. Hawghton*) a By-Law for restraining the Liberty of the Trade of a Carman, was holden bad.

Mr. Williams and Mr. Norton, on the other Side, argued for the *Procedendo*, and consequently for the Validity of the By-Law.

This, they said, is not a By-Law in RESTRAINT of Trade: 'Tis only in Regulation of it. And the Court WILL take NOTICE of the Custom of London, "That no Man can exercise a Trade in London, without being free of the City, and of some Company of it." 2 *Stowe*, B. 4. c. 9.

We have returned a Custom, "That we have Power to alter and amend any ancient Custom, and to appoint fit Remedy for the Common Good of the Citizens, where there is Hardship or Defect in it."

1 *Strange* 675. is this very Case, in the Joiners Company: And there is no Return there mentioned or hinted at, of any particular Custom;

Custom; though it is indeed returned "That by the Custom, no Person can be free of the City, without being free of *One* of the Companies."

In 5 Co. 62. *Chamberlain de Londres Case*, The By-Law about bringing Broad-Cloths to *Blackwell-hall* to be searched, &c, was held a good By-Law: And yet there is no particular Custom set forth, on which to found the By-Law.

In 2 Rol. Abr. Tit. *By-Laws*, pa. 365. pl. 9. "That none shall make, or use a Hot-Prefs in *London*."—There is no particular Custom, on which the By-Law is founded: Yet it was holden a good By-Law.

8 Co. 126. a. *Waganor's Case*, and also Sir T. Raym. 288. *Player v. Vere*, prove that Customs in *London* may partially restrain Trade.

They admitted that a particular Custom empowering them to make *this particular* By-Law, is *not* minutely set out: But at the same Time insisted, that they had set forth *enough* of a particular Custom, to warrant this by-Law. For it is set forth, "That if any ancient Custom, hard or defective, &c, wants Amendment, the Mayor and Aldermen with the Consent of the Commonalty, have by Custom a Power of appointing *fit Remedy* for the Common Good of the Citizens: So as, &c." Which is a *general* Power of making By-Laws by Custom: And this Power, confirmed too by Act of Parliament.

Now the present By-Law falls within the Provision of this *general* Power.

The Substance of this By-Law is, "That no Butcher by Trade, though free of the City, shall exercise this Trade in the City, without being free of the Butchers Company." And it was both a *Hardship* and *Defect*, that they *might do so, previously* to this By-Law.

Here is a Custom shewn, "to *restrain* ALL grown or growing Evils, within the City:" Which is a Custom to *restrain* Trade. And there are Hundreds of By-Laws in *London*, founded upon this *general* Power.

And *Wannell's Case*, is, in Substance, *in Point*: It is a general Return of an Authority to make By-Laws under their *general* Power; and the same Sort of By-Law with the present one, is established as a *good* One.

Lord

Lord Mansfield: I suppose it is a *Slip* in the Return.

I don't take the Objection to be "that it is necessary that it must be a particular Custom to make a *particular* By-Law:" But, "that there is *no general* Power here shewn, under the Custom, to lay such a Restraint upon Trade."

This By-Law is a *Restraint* of Trade; and *not* a MERE *Regulation* of it: The Preamble *don't pretend* it to be made to regulate the Trade; but *merely* for the *Benefit* of the *Butchers Company*. It is founded upon the *general* Power of making By-Laws in the City of *London*.

Now under a *GENERAL* Power to make By-Laws, it is certain, that a By-Law cannot be made "to *RESTRAIN* Trade."

And by the *general Custom* of *London*, every Freeman may exercise *any* Trade, *without* being free of a *particular Company*: Which this By-Law requires Him to be.

The Case in 1 *Strange* 675: *Wannell's Case*, is not a full State of the Pleadings. But it appears that the Return stated "that no Person could be a Freeman of the city, till he was a Member of one of the Fraternities;" then stated a Power to make By-Laws; (but *how* that Power was set out, don't appear:) Then the By-Law itself is there set out; which professes to be a *Regulation* of Trade, and recites "that several Persons not free of the Joiners Company had exercised the Trade of a Joiner in an *unskilful* and *fraudulent* Manner, which could not be redressed whilst such Persons were not under the Orders and Regulations of the Company;" and *therefore* it enacts that no Person shall use that Trade, who is not free of the Company.

The By-Law for ordering and disposing of Carts and Cars, in *Sir Tho. Raym.* 288, 289. is a *mere Regulation* of Trade.

And as this Power to make By-Laws to *restrain* Trade, is *NOT* set out, in the present Case, We *cannot presume* it, from any printed Book, or any other way whatsoever. We cannot take *judicial* Notice of any *particular* Custom supporting such a By-Law as this; when no such particular Custom is set out: And it certainly is not good under the *general* Power, which *is* set out.

Mr. Just. Denison concurred, that the court could not take *judicial* Notice of any such particular Custom to warrant this By-Law, without it's being *set out*.

I

And

And the Custom here set out, of a Power "to mend any hard or defective Customs," is *not sufficient*: For here is *no* hard or defective Custom particularly set out. And every Man, free of the City, had a Right to set up any Trade: Which original Right is here taken away by this By-Law.

Indeed they may make By-Laws to *regulate* Trade; but *not* to *restrain* it, unless they have a particular Custom to support such By-Laws. As to the Case of the ordering and disposing of Carts, Cars, Carters and Carmen, in *Raym.* 288. *Player v. Vere*, That was a By-Law for Regulation of Trade, and Prevention of Nuisances in the Streets and Lanes: But *this* is a By-Law to RESTRAIN Trade, not warranted by any particular Custom. Therefore he held it bad.

Mr. Just. *Foster* concurred; and spoke to the same Effect.

Mr. Just. *Wilmot* expressed Himself to the same Purport.

By the Court unanimously, The By-Law was holden a *bad* One: And the Rule for shewing Cause "why a *procedendo* should not go," was discharged.

Rex *vers.* Killinghall.

MR. Serjeant *Poole* and Mr. *Clayton* shewed Cause against a Rule which had been moved for by Mr. *Norton*, "to quash a Presentment or Inquisition found by the *Grand Jury* of the County of *York*, at the general Sessions of *Oyer and Terminer*, for that County:" Which Mr. *Norton* objected to, as being *coram non Judice*; For, he said, the *Grand Jury* had no Authority to make such a Presentment, or find such an Inquisition, under their GENERAL Charge from the Judge of Assize; whatever might be the Case if the Judge had particularly directed and presided over an Inquisition of this kind, upon the Neglect of the Coroner.

The Fact found, was "That the Mare of *John Killinghall*, Esq; was the Cause of the Death of one *William Stelling*; and was of the Value of 10*l.*"

It happened that the Coroner had not taken any Inquisition at all, upon this Death: So that the Lord of the Manor, finding Himself likely to lose his Deodand, had made this Application at the Assizes; where the *Grand Jury* found this Inquisition or Presentment; which was afterwards removed hither, by *Certiorari*.

Mr. Serjeant *Poole* and Mr. *Clayton* endeavoured to support it.

F

This

This Inquisition, they said, before a Grand Jury is *traversable*, (which a Coroner's Inquisition is *not*;) and therefore does No Body any Injury. And as the Coroner had taken *none*, at all, upon the present Occasion, *this Method* was *necessary* to be taken, in order to come at the Deodand.

1 *H. H. P. C.* 419. *c.* 32. Of Deodands, shews most expressly that this may be done, before Commissioners of Gaol Delivery, Oyer and Terminer, or of the Peace, if omitted by the Coroner. So does 1 *H. P. C.* 414. in treating of Inquisitions; where *Laughton's Case*, *H.* 37 *Eliz.* is cited; and it is said to be "inquisible before the Justices of Oyer and Terminer; yea, or of the Peace; and that it had been adjudged accordingly, *M.* 1656. in *Greeve's Case*."

3 *Inst.* 55. *c.* 8. *Note b. in Margine*, makes a Difference between Inquisitions taken before the Coroners, and Inquisitions taken before Justices of the Peace, as to having a Traverse.

2 *Ro. Abr.* 96. *pl.* 3. proves that an Indictment may be taken before Justices of Peace, and of Oyer and Terminer.

2 *Lev.* 140. *Rex v. Parker* is in Point, "that the Coroner's Omission may be supplied by Commission of Inquiry; or the Justices of Peace, or of Assize may inquire of it, without Commission."

2 *H. H. P. C.* 58. *cap.* 8. concerning the Coroner and his Court, and his Authority in Pleas of the Crown, proves that Grand Juries have this Jurisdiction in Case the Coroner neglects it.

2 *H. H. P. C.* 59. *Ad idem.* It is there said "that Justices of Peace, or Oyer and Terminer, or of the King's Bench may inquire, if the Coroner do not: But that THAT Presentment is traversable; which the Presentment of the Coroner of a *Felo de se*, is *not*."

Upon these Authorities, they said, my Lord *Falconbridge* (the Lord of the Manor) was advised to take this Method: But the Judge of Assize (Mr. Just. *Birch*) declined to meddle with it, or to have the Inquisition taken before him *particularly*, or to give any *particular* Direction about it.

They added these Cases also, 1 *Ventr.* 352. in the Note at Bottom. *Poph.* 209. *Anon'*: and *S. C.* (apparently,) in *Noy* 87. "It may be done before Justices of Peace." 1 *Ventr.* 181, 182. *Stanlack's Case*. "If a Coroner omits to inquire, this Court may do it, as
2 "supreme

“supreme Coroner of *England*; or may make Commissioners to inquire: Or Commissioners of *Oyer and Terminer* may inquire. But then it is not *super visum Corporis*; and therefore may be traversed.”

Mr. Norton *contra*.

This is a Presentment *ex parte*; and a Presentment of *intitling*, in order to found an *odious and superstitious* Claim; and *all transacted*
IN SECRET.

The Cases cited only prove, “That, in Default of the Coroner’s having inquired, the Justices of *Oyer and Terminer*, and of the Peace, may make the Inquiry; and that it is traversable.”

They say “That we could not have traversed the Coroner’s Inquisition;” (Which, however, I *deny*;) “But this we may traverse; and therefore can’t be injured by it.”

But will it be said “that the *putting* a Man to a Traverse, is *no Injury*?”

4 *Inst.* 196, 197, 198. enters largely into the Subject of Traverses; and condemns secret Inquests and Offices.

Now this is an Office of Intitling; and therefore ought to be *publicly and openly* found.

Lord Mansfield. By express Statutes.

And I remember a Case of the late Duke of *Buckingham’s* Heirs; where, upon Application to the Court of Exchequer, Notice was directed to be given: Though, in general, *Notice* is *not* necessary.

Therefore I think *this* Inquisition can’t be supported.

And Inquisitions before the Coroner *are* traversable. [*V. 2 H. H. P. C.* 416. where that Author declares his own Opinion accordingly.]

Mr. Just. Denison: I think it cannot be supported.

Mr. Just. Foster: I am of the same Opinion.

Rule to quash the Presentment made absolute.

Friday

Friday 19th Novemb. 1756.

MEMORANDUM, On this Day, The GREAT SEAL was put into COMMISSION; being delivered by his Majesty (immediately upon the Earl of HARDWICKE's Resignation of it,) to SIR JOHN WILLES Lord Ch. J. of the Common Pleas, SIR SIDNEY STAFFORD SMYTHE third Baron of the Exchequer, and SIR JOHN EARDLEY WILMOT youngest Judge of this Court: Which prevented Mr. Justice WILMOT from sitting much in *this* Court, during the Remainder of the present Term and the Whole of the two subsequent Terms.

Oppenheim qui tam *vers.* Harrifon.

Saturday 20th
November
1756.

THE Proceedings were set aside for Irregularity in the want of an *Attorney's Name* being duly set to them: It appearing that although they had the Name of a regular Attorney, *in Fact*, set to them; yet it was so set, WITHOUT any *Authority from Him*.

And the Court also granted an *Attachment* against one *Habin*, who acted as Attorney for the Plaintiff, and had so put Mr. *Granger's Name* (an Attorney of this Court) *without Authority or Leave from Mr. Granger*.

Cooper and another, Assignees of William Johns a Bankrupt, *vers.* Chitty and Blackiston Esquires, Sheriffs of London. *Hil.* 27 G. 2. *Rot.* 869.

Tuesday 23d
November
1756.

THIS Cause was twice argued: It came first before the Court, on Monday 9th June 1755; and again, upon Tuesday the 16th Instant. It was an Action of Trover brought by the Assignees of *William Johns*, a Bankrupt, AGAINST the SHERIFFS of London, who had taken and sold the Goods of *Johns* in Execution under a *Fieri facias* which had issued against *Johns*, at the Suit of one *William Godfrey*.

On the Trial, a special Case was settled:

Which Case states, That *Johns* was regularly declared a Bankrupt on the 8th of Decemb. 1753. And as to the Rest, the following Times and Facts were stated; *viz.* That on the 5th of December 1753. one *Godfrey* obtained Judgment in the Common Pleas, against the said *Johns*; and on the same Day (5th December 1753)
Execution

Execution upon the said Judgment was taken out against Him by *Godfrey*, and the Goods seized by the Sheriffs, under it; That *Johns* committed the Act of Bankruptcy 4th December 1753, and on the 8th of the same December, a Commission of Bankruptcy was taken out against Him; and on the very same Day, the Commissioners of Bankruptcy executed an ASSIGNMENT; and afterwards, viz. on the 28th of December, a Bill of Sale of the Goods was made, by the Sheriffs. The Plaintiffs are the Assignees under the Commission: The Defendants are the Sheriffs of London, who seized the Goods under the Execution.

The Point was, Whether the Assignees under the Commission of Bankruptcy can maintain an Action of Trover, against the SHERIFFS (who executed this Process under a regular Judgment and Execution;) for seizing the Goods, under a *Fieri facias* issued and executed after the Act of Bankruptcy was committed; and selling them, after the Assignment was executed.

The Counsel, who argued for the Plaintiffs, made two Questions, viz. Argument for the Plaintiffs.

1st, WHOSE Property the Goods were, when seized by the Sheriffs, by Virtue of this *Fieri facias*;

2dly, Whose Property they were, when SOLD by the Sheriffs.

1st Question. After the Act of Bankruptcy, they ceased to be the Property of the Bankrupt Himself, they said; wheresoever else, the Property might be, between the Act of Bankruptcy and the Assignment.

This Relation to the Act of Bankruptcy is like that of Administrations to the Time of the Death: And they cited *Kiggil v. Player*, 1 Salk. 111. as S. P. with the present Case, exactly.

The utmost that the Bankrupt Himself could be pretended to have, was a special property, defeasible by the Assignment. It is like the Case of a Distress for Rent; where the Seizor may sell the Distress, after 5 Days; but if the Money be paid within the 5 Days, he can't sell: So that in the Interim, the Right is defeasible.

Here, the Plaintiffs have declared as Assignees under the Commission of Bankruptcy: Therefore their Interest vests as from the Time of the Act of Bankruptcy.

If the Bankrupt Himself had delivered the Goods to a Stranger, it had been the same Thing: The Stranger would be answerable to the Assignees.

G

Sheriffs

Sheriffs execute Procefs *at their Peril*: They are answerable *civiliter*, for what they do upon it. 11 H. 4. 90. 14 H. 4. 25.

A Man may, without his own Fault, be possessed of a Horse which has been stolen: But nevertheless he is answerable, *civiliter*, to the true Owner, for it.

The Sheriff had no Authority to take any Goods in Execution, *but* the Goods of the *Defendant*: If he does take any *other* Goods, he is a Trespasser.

In Writs of Execution, it is at their Peril, if they take *another* Man's Goods. In *Cartbew* 381. *Hallett v. Byrt*, 'Tis so laid down by Ch. J. *Holt*, expressly.

Now these were Goods of the Assignees. And they may maintain an Action, *either* against the *Plaintiff* in the Cause, *or* the *Sheriff*, *OR* the *Vendee* of the Goods: And the Sheriff is the *properest* Person, against whom to bring the Action.

The *Gift* of an Action of Trover is the CONVERSION: The *Find-
ing* is not the material Part.

And they cited several *Nisi prius* Cases, of Actions brought by Assignees of Bankrupts: *Viz.*

M. 11 G. 1. Trover by *Vanderbagen & al.* Assignees of *Daniel*, a Bankrupt, *v. Rewise*, a Serjeant as Mace of the City of *London*; S. P. with the present. Lord Ch. J. *Pratt* held the Action maintainable.

The S. P. was also before Lord Ch. Just. *Lee*, in a Case of *Bloxholm*, Assignee of *Mills* a Bankrupt, *v. Oldham & al.* at the Sittings after *Tr.* 1750. at *Guildhall*: In Trover against a Sheriff, and the former Plaintiff, and the Vendee, (all of them together.) It was objected "That the *Sheriff* ought to be acquitted:" But overruled; and Verdict against *all three*.

The Seizure there was *before* the *Commission*, but AFTER the ACT of Bankruptcy.

The second Question is, "*Whose* the Goods were, at the TIME OF THE SALE." The Writ only commands the Sheriff, "to sell the DEFENDANT'S Goods:" And if he sells the Goods of *another* Person, it is a CONVERSION.

It is beyond Doubt, that the Assignment has *Relation to the Act* of Bankruptcy: And the Assignees stand in the Bankrupt's Place, *from that Time.* 1 Ventr. 193. Monk v. Morris and Clayton proves this.

Here then the *Assignees* had *all* the Property that the *Bankrupt* had, at the Time of his *Act* of Bankruptcy. Consequently, the *absolute Dominion* was in *them*: And the Sheriff could not, AFTER such Assignment, *sell* them, as the Defendant's. Indeed Sheriffs seldom do, *in Fact*, sell the Goods, without Indemnity. But the Sheriff has here *committed an Error*, in selling them *at all*: For they were *not* the Defendant's. He might, it is true, have summoned a Jury to inquire "*Whose Goods* they were." But still, even their Verdict cannot affect the Right of the *true Owner* of the Goods.

The Point about *Relation* backwards, does not at all affect the Question, *as to the SALE.* For the Assignment was *prior* to the SALE, though not to the *Seizure.*

And they affirmed that the Sheriff not only might, but even ought, in this Case, to have returned "*Nulla bona*:" That would have been the proper, and the true Return. And if it had been disputed, he then might have *brought the Money into Court.* There is a Case, of *Rex v. Brein* Bailiff of the Savoy, 1 Keb. 901. where the Goods were claimed under a Bill of Sale; the Sheriff returned "*Nulla Bona*;" and the Money was Ordered to be brought into Court by the Sheriff; and the Return to be made agreeable to the Event of a Trial of the Validity of the pretended Bill of Sale, after such Validity should be tried in an Action.

In the present Case, the Defendants *knew of* the Assignment, BEFORE *they* SOLD *the Goods*; whatever they might do, when they *seised* them. And they could not possibly be *obliged* to sell them: It is contrary to an express Act of Parliament, which vests the *Property in the Assignees.* So that here the Sheriff has sold the Goods, not of the Bankrupt, but of the *Assignees.*

And supposing that the Plaintiffs may bring an Action against the Plaintiff in the original Action, OR against the Vendee of the Goods; yet they seem, both of 'em, to have better Excuses than the *Sheriff* has; and are more innocent. Therefore why should the Assignees be turned round to *them*, when they can undoubtedly maintain either Trespass or Trover against the Sheriffs, who have *sold* the Goods; which is a Conversion, and will support an Action of Trover? That the Plaintiffs have this Election, to bring either

Trespass or Trover, appears from *Cro. Eliz.* 824. *Bishop v. Lady Montague*, and *Cro. Jac.* 50. S. C.

Therefore they concluded that the Action was well brought.

Argument for
the Defen-
dants.

The Counsel who argued for the Defendants, the Sheriffs, agreed that the Matter would turn upon the Solution of the two Questions made by the other Side.

As to the first Question, They said it would be very hard, if this Action should lie AGAINST *the* SHERIFFS; and *they* be put to controvert the Act of Bankruptcy, which is a Matter not at all within their Knowledge.

They argued that the Sheriffs shall not be considered as WRONG-Doers: And to prove it, cited 1 *Lev.* 95. *Turner v. Felgate.* *Raym.* 73. S. C. 2 *Siderf.* 126. S. C. and 1 *Keble* 822. S. C. 1 *Lev.* 173. *Baily v. Bunning.* 1 *Siderf.* 271. S. C. and 2 *Keble* 32, 33. S. C.

The only Acts of the Sheriffs that can be considered as a *Conversion*, are the Acts of *Seizure* and *Sale*.

Now they were compellable by the Writ of *Fieri facias* to seize the Goods and levy the Debt.

For TILL *the Commission and Assignment*, the Property was in the Bankrupt: And it did not appear that a Commission EVER WOULD be taken out.

1 *Salk.* 108. *Cary v. Crisp*, is express in Point, "that the Property is in the Bankrupt, till Assignment." It was there resolved that the Property of the Goods is *not* transferred out of the Bankrupt till Assignment. 2 *Str.* 981. *Brassey & al' v. Dawson & al' accord'.*

1 *Lev.* 173. *Baily v. Bunning.* Judgment was for the Officer; He being obliged to execute the Writ; and could not know of the Act of Bankruptcy, or that any Commission would ever be sued: And the Sheriff was holden not to be liable, although he had Notice of the Assignment.

1 *Siderf.* 272. S. C. The Taking was holden lawful.

Comberb. 123. *Lechmere v. Thorowgood.* The Officer shall not be made a Trespasser, by Relation. 3 *Mod.* 236. S. C. 1 *Shower* 12. S. C.

The

The *Commission* of Bankruptcy makes no Alteration, *TILL Assignment*: And *AFTER Assignment*, there shall be a *Relation*, so far as to avoid all mesne Acts of the Bankrupt, and *even to over-reach this Judgment-Creditor*. Thus far, they admitted.

But they insisted that the Action *ought not* to have been brought against the SHERIFF.

The Sheriff is to *seize, sell, and return his Writ*. In Proof of this, they cited 2 *Ld. Raym.* 1072, 1074. *Clerk v. Withers.* 1 *Salk.* 322, 323. S. C. (3d Point.) 6 *Mod.* 293, 299. S. C. 1 *Siderf.* 29. *Harrison v. Bowden.* *Cro. Eliz.* 235. *Mountney v. Andrews.* 1 *Ro. Abr. Execution* 893. Letter B. pl. 2. *Dyer* 98. b. and 99. a. § 57. and the two Cases there cited in the Margin. And *Cro. Eliz.* 597. *Charter v. Peeter*. From all which Cases, it appears that the SHERIFF is not liable to be molested.

1 *Salk.* 321. *Kingsdale v. Mann* proves that the *Seizure* is the *Essential Part* of the Execution: And an Execution is an *entire Thing*; and *cannot be stopped*, after it is once begun. 2 *Show.* 79. *Cockram v. Welbye*.

And after the Sheriff had seized these Goods, the original Plaintiff, (*William Godfrey*) could oblige the Sheriff to return his Writ: And yet, upon the Principles advanced, the Sheriff must be put under the greatest Hardships. And he had NO METHOD to make the *Assignees* of the Bankruptcy to give him any *Assistance towards proving* the Act of Bankruptcy.

Indeed the Execution is *good*, though the Writ be *never* returned. 5 *Rep.* 90. a. *Hoe's Case*: (1st Resolution.)

The only Return the Sheriff could make must be, "That he *had levied* the Money:" (which could only be by Sale.) Therefore he was OBLIGED to *sell*. Consequently the Law will not make him a Wrong-doer, *by selling*.

The following Cases, they said, were in Point for them; viz. 1 *Lev.* 173. *Baily v. Bunning.* 2 *Keble* 32, 33. S. C. 1 *Siderf.* 271. S. C. 3 *Lev.* 191. *Philips v. Thompson.* 1 *Show.* 12. *Lechmore & al' v. Thorowgood & al'.* *Comb.* 123. S. C. 3 *Mod.* 236. S. C. and *Cole v. Davies & al'.* 1 *Ld. Raym.* 724. *per Holt* in Point, as against the Sheriff, most expressly.

And the present Plaintiffs may have an *adequate and complete Remedy*, against the Plaintiff in the original Action.

H

As

As to the Cases cited, The Gentlemen who have argued on the other Side, put it upon the Question, "Who had the *Property* of "the Goods."

Now the Property was in the *Bankrupt*, at the TIME of the Execution: It was NOT *in Abeyance*; as it is in the Case of an Administration. (Which is an Answer to the Case of *Kiggil v. Player*.)

The Sheriff is not in the Case of a *Stranger*. For he was OBLIGED to execute and return the Writ.

Indeed the Sheriff is to execute the Writ at his Peril; and *Carthew* 381. is so: The Reason is, because the Sheriff may impanel a Jury, to inquire "whose the Goods are." But here, there were no Means for the Sheriff to indemnify himself: The Goods were undoubtedly THEN the Goods of *William Johns*; even though he had then committed an Act of Bankruptcy.

The Assignees have not a Right to recover the SPECIFIC Goods; but only *Damages*.

Trespass will lie against the Plaintiff in the original Action, even before he receives the Money: though *Trover* indeed would not, till AFTER.

It is not certain that an Action will lie against the *Vendee* of the Sheriff.

As to *Vanderbagen's* Case, it is not sufficiently clear, how it was; or why it was determined.

But as to the Case of *Bloxham v. Oldham*, Mr. Henley did not * insist on the Objection, "That the Action would not lie against "the Sheriff;" because it would not help his Client: For in that Case, the Sheriff, and the Plaintiff in the Original Action, were Both of them Defendants. And the Case of 1 *Leo*. 173. was not indeed by Lord Ch. J. *Lee*, thought apposite to that Case: But it was not over-ruled by Him. And the Goods were certainly the Goods of the Bankrupt, till Assignment.

* N. B. Mr. Hume, who was Counsel for the Defendant in that Case of *Bloxham v. Oldham*, agreed, "That the Objection "against the Sheriff's being a Defendant," was NOT insisted upon; because the Plaintiff in the Original Action (who was also a Co-Defendant with the Sheriff there) had indemnified the

the Sheriff: So that it was, really, a Point quite *immaterial* to the Plaintiff; (who was at *All Events* liable to the Action.)

They added, that this was a Point of great Consequence to all Sheriffs and Officers: On the other Hand, Creditors cannot be injured, though Sheriffs should be excusable, and the Original Plaintiff *only* should be liable to the Action.

As to what has been said of *Security* taken by the Sheriff.—The Court can take no Notice of a Sheriff's taking Security; nor can they suppose Him conscious of a *private* unknown Act of Bankruptcy: And it would be very hard if an innocent Officer should be hurt by *Retrospection* and *Relation*.

They agreed that this Execution may be avoided, *as against the Original Plaintiff*: 2 Strange 981. *Brassey & al. v. Dawson & al.* is a Proof "that it may." But they denied it, *as to rendering the Officer* liable to an Action: For *He* is excusable; as appears from the Cases before cited.

As to the second Question.—The Foundation of this Action of Trover, is *Property in the Plaintiff*, at the Time of the Seizure; and a *Tortious and Illegal Act of Conversion*: For without *both* these Circumstances, *this Action* will not lie.

Now the PROPERTY is in the BANKRUPT, TILL *Assignment*: And the *subsequent Sale* cannot make the Sheriff a Wrong-doer, by a *fictitious Relation*. Raym. 161. *Bilton v. Johnson & al.* "The Relation of a Teste shall not justify a Tort."

It is said that "this Relation is given by *Act of Parliament*." But there are no Words in the Act of Parliament that can make the Sheriff a *Wrong-doer*.

If the seizure was lawful, the Sale was so too. 2 Ld. Raym. 1074, 1076. *Clerk v. Withers*. Cro. Jac. 515. *Sly v. Finch*. Cro. Eliz. 440. *Boucher v. Wiseman*. March 13. *Parkinson v. Colliford & al. Executors of a Sheriff*. Cro. Car. 539. S. C. 1 Jones 430. S. C. Hob. 206. *Speake v. Richards*. Cro. Eliz. 237. *Mounteney v. Andrews*. The Law considers the whole Execution, as one entire Act: The intermediate Days are only allowed for the Sake of the Sheriff. Consequently, He may execute the Whole at once: He may seize, and sell directly. The Execution is an entire Thing; and can not be stopped. Cro. Eliz. 597. *Charter v. Peeter*. 6 Mod. 293. *Clerk v. Withers*. Therefore the Officer shall be protected.

Suppose

Suppose an *Action* should be brought *against the Sheriff* for the *Money*. He might avail Himself perhaps by special Pleading; *provided* He was able to make out the Facts he should specially plead: But *how* could He be able to *prove* the Act of Bankruptcy, Trading, or Assignment; to all which, He is in entire Stranger? Therefore it would be hard to suffer such an Action to be maintained against Him. But *all* these Matters are in the *Privy of the Original Plaintiff*: Against *whom*, therefore, the Action ought to be brought.

It is said, "the Sheriff acts at *his Peril*."

But it is admitted that the Method of impanelling a Jury would be *no Protection* to Him.

Reply.

The Counsel for the Plaintiffs replied, That it is stated "That the *Assignment* by the Commissioners of Bankruptcy was *previous* to the *Bill of SALE* by the Sheriffs."

The Sheriff's being always a *responsible* Person, and therefore most likely to be made Defendant, is the very Reason why He *ought* to be liable to the Party who has received the Injury.

The *Finding*, or even the *Taking Possession* of Goods found, is *no Wrong*: But 'tis the *CONVERSION* that makes the Person a *Tortfeasor*.

They admitted that the Sheriff is *not* answerable for the *Irregularity of a Judgment*: (For He is bound to execute the Command of the Writ.) But if He take the *Goods of ANOTHER PERSON*, *instead of* the Goods of the Defendant, He is answerable for *THAT*.

It has been said indeed, that "they were *at THAT Time* the *Goods of the Bankrupt Himself*."

But be the *TAKING* lawful, or not lawful, yet here is an *actual CONVERSION*, an *actual DISPOSITION* of the Goods: Which makes him a Trespasser *ab initio*.

It has likewise been said, that "the Court will protect the Sheriff." But the *Relation* goes back, *quite up to the Act of Bankruptcy*.

They denied that the Execution is *so entire* that the Sheriff can *not stop* in it, after Seizure and before Sale of the Goods. Suppose the Sheriff had confessedly seized *another Person's* Goods, should He be obliged to sell them? *Dalton's Office of Sheriff* says "The Sheriff
"riff

“riff may impanel a Jury; and *after that*, shall not be answer-
“able.” Now here He might either have impanelled a Jury; or
have kept the Money in his Hands, or brought it into Court, till
the Property of the Goods had been determined.

They admitted the general *Principle* of the Cases cited on the
Head of Executions; but *denied the Application* of them to the
present Case. They also denied the Principle, “That a Sheriff
“shall never be a Tort-feasor *by Relation* :” For, He shall in *some*
Cases be so; as where He takes the Goods with a *bad Original In-*
tention.

As to *Baily v. Bunning*, They endeavoured to distinguish it. In
order to which, they remarked, that there is *no Finding* of an
ACTUAL *Conversion*, or of what could be called so by the Court:
It is only a *Demand and Refusal*; which is ONLY EVIDENCE to a
Jury. And the Opinion of the Court there went upon the *Taking*;
which they held to be legal: Whereas here is an ACTUAL *Conver-*
sion stated. An Action would lie, One would think, against the
Vendee of the Sheriff, in Point of Reason: And the *Practice* does
strongly support it; for Nine in Ten of these Actions *are* brought
against the *Vendees* of the Sheriff.

In the Case of *Bloxham v. Oldham*, there was a very *material*
Difference, “Whether the Sheriff should have a Verdict *for Him*,
“or a Verdict *against him*: For in the *one* Case, He would *re-*
ceive Costs; in the *other*, He must *pay* them.

The Plaintiffs had no Right to call upon the Sheriffs, TILL the
RETURN of the Writ: And they might *then* have returned
“*Nulla Bona*.” Therefore this is *not* such a hard Case upon the
Sheriffs, as is suggested. And this is not the only Case where the
Sheriff is to act at his *Peril*: For in taking of Bail, &c, He must
do so, as well as here.

If the Sheriff had returned “*Nulla Bona*,” the *Onus probandi*
would have lain upon the Original Plaintiff.

In the Case of *Turner v. Felgate*, the Sheriff was certainly ex-
cusable, by Virtue of his Writ.

In the Case of *Cole v. Davies & al* in 1 *Ld. Raym.* 724. The
Goods were sold *before* the Commission and Assignment. For the
Case is there put, of a Commission and Assignment, *both* of them
SUBSEQUENT to the Sale of the Goods. The Words are, “If He
“seizes AND *sells*,” and THEN a Commission is granted, and the
“Goods assigned, the Assignee may maintain Trover against the
I “Vendee:

“ Vendee : But No Action will lie against the Sheriff, because
 “ he obeyed the Writ.” But our Reasoning in the present Case is
 founded upon the *Sale’s* being an *unlawful Act*.

In the Case of *Brassey & al’ v. Dawson & al’* there was no Assignment, previous to the Seizure.

They did not deny that the Bankrupt had in the present Case, a Sort of Property, a *defeasible Property*, in Him at the Time of taking the Goods. But in the Case of *Clerk v. Withers* (reported in 6 *Mod.* 290. and in 1 *Salk.* 323. and in 2 *Ld. Raym.* 1072.) the Defendant in the Action had the whole *indefeasible Property* in Him; and the Sheriff ought to have gone on: But that Case is not applicable to the present Case; where the Property was only *defeasible*.

As to the Cases cited from *Hob.* 206. and *March* 13. They agreed to them.

The *Time* allowed to the Sheriff makes no Difference, (They said;) because He has done Wrong.

And however *entire* a Thing an Execution, in general, may be; yet here it was *irregularly executed*.

The Truth of the Return of “ *Nulla bona*,” in this Case, depends upon the present Question.

It is very frequent for Sheriffs to be intangled in Difficulties about their Returns. Here, he might have taken a Writ *de Proprietate probanda*.

Bailey v. Bunning turned upon the *Taking*.

Lechmere & al’ v. Thorowgood only proves “ That the Goods “ were *in Custodia Legis*.” And so they were: But to the Purposes of the Law; which, in the present Case, is for the Benefit of the Creditors of the Bankrupt.

CURIA ADVISARE VULT.

And now (*Tuesday* 23d *Novem.* 1756.) Lord MANSFIELD, delivered the Opinion of the Court; and said they were *All* agreed, as well his two Brethren then present in Court, as his Brother *Wilmot*; (who was at present engaged in another Place,) in their Opinion.

There are *few Facts essential* to this Case; and it lies in a *narrow Compass*.

He then stated the Case, (which see in *p. 20. ante* :) And was very particular in specifying the *Dates* of the several Transactions.

The General Question is, "Whether or no the Action is maintainable by the Assignees, against the *Defendants*, the *Sheriffs*, who "have taken AND SOLD the Goods."

It is an Action of TROVER.

The bare Defining the Nature of this Kind of Action, and the Grounds upon which a Plaintiff is intitled to recover in it, will go a great Way towards the Understanding, and consequently towards the Solution of the Question in this particular Case.

In *Form*, It is a Fiction: In *Substance*, a Remedy to recover the Value of Personal Chattels *wrongfully* converted by another to his own Use.

The Form supposes the Defendant *may* have come lawfully by the Possession of the Goods.

This Action lies, and has been brought in many Cases where, in Truth, the Defendant has got the Possession *lawfully*.

Where the Defendant takes them *wrongfully*, and by Trespass, The Plaintiff, if He thinks fit to bring *this* Action, waves the Trespass, and admits the Possession to have been *lawfully* gotten.

Hence, if the Defendant delivers the Thing upon Demand, No Damages can be recovered in *this* Action, for having *taken* it.

This is an Action of Tort: And the whole Tort consists in the *wrongful Conversion*.

Two Things are necessary to be proved, to intitle the Plaintiff to recover in this Kind of Action: 1st, *Property* in the Plaintiff; and 2dly, A *wrongful Conversion*, by the Defendant.

As to the first, It is admitted in the present Case, that the *Property* was in the Plaintiffs, as on and from the 4th of December, (which was *before* the Seizure,) by *Relation*.

This *Relation* the Statutes concerning Bankrupts introduced, *to avoid Frauds*. They vest in the Assignees, All the Property that the Bankrupt had, at the Time of what I may call the *Crime* committed, (for the old Statutes consider him as a Criminal :) They make

make the Sale by the Commissioners good against All Persons who claim by, from, or under the Bankrupt, *after* the Act of Bankruptcy; and against all Executions not Served and Executed *before* the Act of Bankruptcy.

Dispositions by Process of Law are put upon the same Foot with Dispositions by the Party: To be valid, they must be *completed* before the Act of Bankruptcy.

Till the making of 19 G. 2. c. 32. If the Bankrupt had *bonâ fide* bought Goods, or negotiated a Bill of Exchange; and thereupon, or otherwise in the Course of Trade, *paid* Money to a fair Creditor, *after* He himself had committed a *secret* Act of Bankruptcy, Such *bonâ fide* Creditor was liable to *refund* the Money to the Assignees, after a Commission and Assignment: And the Payment, *though* really and *bonâ fide* made to the Creditor, was avoided and defeated by the *secret* Act of Bankruptcy.

This is remedied by that Act, in Case *No Notice* was had by the Creditor, (prior to his receiving the Debt,) "That his Debtor was " become a Bankrupt, or was in insolvent Circumstances."

Therefore as to the *first* Point, It is most clear, that the *Property* was *in the Plaintiffs*, as *on and from the 4th of December*, when the Act of Bankruptcy was committed.

2dly, The only Question then is, "Whether the Defendants are guilty of a wrongful CONVERSION."

That the Conversion itself was wrongful, is manifest.

The Sheriffs had *no* Authority to *SELL* the Goods of the *Plaintiffs*; but of *William Johns*, only: They *ought* to have *delivered* these Goods to the Plaintiffs the Assignees. Upon the Foundation of the legal Right, the Chancellor, even in a summary Way, would have ordered them to be delivered to the Assignees.

It is *admitted* on the Part of the Defendants, That the innocent *Vendee* of the Goods so seized can have no Title under the Sale, but is liable to an Action; and that *Godfrey* the Plaintiff would have no Title to the Money arising from such Sale, but if He received it, would be liable to an Action to refund.

If the Thing be clearly wrong, the only Question that remains is "Whether the Defendants are *excusable*, *though* the Act of " Conversion be Wrongful."

Though

Though the Statutes concerning Bankrupts rescind all Contracts and Executions not completed before the Act of Bankruptcy, and vest the Property of the Bankrupt in the Assignees by Relation, in order to an equal Division of his Estate among his Creditors, yet they do *not* make Men *Trespassers or Criminal by Relation*, who have *innocently* received Goods from Him, or executed legal Procefs, not knowing of an Act of Bankruptcy: *That* was not necessary, and would have been unjust.

The Injury complained of by this Action, for which Damages are to be recovered, is *not the Seizure*, but the *wrongful Conversion*.

The *Assignment* was made upon the 8th of December; the *Sale*, not till the 28th of December; the *Return*, not till the Octave of Saint Hilary, (which is the 20th of January.)

The Sheriff acts at his *Peril*; and is *answerable for any Mistake*: Infinite Inconveniences would arise, if it were not so.

At the *Time* of the Sale and Return, it was more notorious "that these Goods belonged to the Plaintiff's, than it could probably have been in the Case of any third Person; because Commissions of Bankruptcy and the Proceedings under them are *public* in the Neighbourhood, and indeed all over the Kingdom.

This Conversion is 20 Days after the Assignment.

The Defendants have here made a direct *false return*: They have returned "That they took the DEFENDANT's Goods, &c." whereas they were, (at the *Time of the Return*,) notoriously the Goods of the ASSIGNEES, when they were taken. They certainly might, and ought to have returned, "*Nulla bona*;" which was the Truth: For the Goods taken, were, beyond all Manner of Doubt, the Goods of the Assignees, at the *Time when* the Sheriffs took them; and the Bankrupt could have no Goods, after the 4th of December, when he had committed an Act of Bankruptcy. They would have been justified by the Truth of the Fact, if they had made this Return: For the Bankrupt neither had nor could have any Goods of his own, at *that Time*. It is arguing in a Circle, to say "That they could not return *Nulla bona*, because they were obliged to sell; and they were obliged to sell, because they could not return *Nulla bona*."

The *Seizure* is, here, out of the Case: For the Point of *this Action* turns upon the *injurious CONVERSION*.

K

Therefore

Therefore We are All of Opinion that the Plaintiff is intitled to recover, in *this* Action.

But Objections have been made, by the Gentlemen who have argued this Case on Behalf of the Defendants.

It has been said " That the Execution is *entire* ; for the Debt is discharged by a Seizure in *Fi. fa.* That, being entire, if once lawfully begun it *must* be completed ; for Goods taken by a *Fi. fa.* shall be sold by the Representative of the Sheriff."

" That they shall be sold, though the Plaintiff dies ; and the Money arising by the Sale shall not be recovered back by the Defendant : " Which is the Case of *Clerk v. Withers*, 1 *Salk.* 323. 2. *Ld. Raym.* 1072. S. C. and 6. *Mod.* 290. S. C.

" That a Writ of Error is no *Supersedeas*."

" That the Sale by the Sheriff shall not be avoided against the Vendee, by a subsequent Writ of Error and Reversal : ' Which is the third Point in *Matthew Manning's* Case in 8 *Co.* 96.

Answer. All this is true, (and upon the plainest Reason,) *as between* the Plaintiff and Defendant, *Parties* to the Judgment in Consequence of which the Execution issues ; but no way applicable to the Case of a *third* Person.

None of these Cases authorize the *Sheriff* to *sell* the Goods of a *THIRD Person* : And it is admitted that the *Vendee* is not protected, here ; because, at the Time of the Sale, the Sheriff had no Authority to sell.

[He then went minutely through the Cases ; shewing the Grounds upon which the Determinations proceeded, as against the *Parties* to the Judgment, who are *bound* by it and every Thing done in Consequence of it.]

But the Argument from these Principles to the present Case, is this : " Here the *Taking* was *lawful* ; and *therefore* the Sheriff was "*bound* to complete the Execution, by a Sale." Answer. The Premises are not true ; and if they were, the Conclusion would not follow.

The Taking was *not* lawful ; because they were *then* the Goods of a third Person.

But if the Taking were lawful, the Sheriff ought not to go on to a Sale, *after* a full Discovery that the Goods then belonged to a third Person.

To prove the Taking lawful, and that therefore the Sheriffs shall not be liable to an Action, were cited the Cases of *Bailey v. Bunning*, reported in 1 *Leon.* 173, 174. 1 *Siderf.* 272. and 2 *Keble* 32, 33. [*V. Ante* 24, 25.] *Lechmere v. Thorowgood*, in *Comb.* 123. 1 *Showers* 12. and 3 *Mod.* 236. [*V. Ante* 24, 25.] and *Cole v. Davies & al'*, 1 *Ld. Raym.* 724. [*V. Ante* 25.]

The Fallacy of the Argument from the Authority of these Cases, turns upon using the Word "*lawful*," Equivocally in two Senses.

To *support* the Act, It is *not* lawful: But, to *excuse* the Mistake of the Sheriff through unavoidable Ignorance, It *is* lawful. Or, in other Words, The Relation introduced by the Statutes, binds the *Property*: But Men who act innocently at the Time, are not made *Criminals* by Relation; and therefore they are excusable from being punishable by Action or Indictment, as *Trespassers*. What they did, was Innocent, and in *that* Sense, lawful: But *as a Ground* to support a wrongful Conversion, by Sale after a Commission publicly taken out and an actual Assignment made, It was *not* lawful.

In the Case of *Bailey v. Bunning*, the Goods were clearly *bound by the Teste*. It is best reported in *Levinz.* The Question referred by the Special Verdict was upon the TAKING; *viz.* "Whether the Party was guilty in the TAKING:" and the Court excuse the Bailiff for his *innocent* executing his Writ. The Case of *Philips v. Thompson*, in 3 *Levinz* 192. expressly says "that this Resolution in the Case of *Baily* and *Bunning* was *only in Excuse* of the Bailiff for executing the Writ."

Siderfin does not seem to know what the Court was going upon: For the Court tied it up to the *Taking*; whereas he does not seem to distinguish between the *Trover* and the *Trespass*. [*V. 1 Siderf.* 272.]

The Case of *Lechmere v. Thorowgood* is best reported in 1 *Show.* 12. And this Report (which is the only clear State of it in any of the Reports) puts it *singly* upon the making the Officers, who had *good Authority* and took the Goods *lawfully*, *Trespassers* by RELATION.

Comberbach, in giving the JUDGMENT of the Court, which is the only sensible Part of his whole Report, (for it is plain to me, that he did not understand the *former* Argument on the *former* Day, which is the first Part of his Report of the Case,) agrees with *Showers*; and says that "the Court were of Opinion that a Construction should not be made, to make the Officer a *Trespasser* by *Relation*: For the *Taking* was *lawful, at the Time*." But He must be mistaken in the first Part of this Report: For Lord Ch. Just. *Holt* could never say "That the Property of the Goods is vested by the *Delivery* of the *Fieri facias*; and the Extent for the King afterwards comes too late." No *Inception* of an Execution can bar the Crown: This Matter was lately very fully discussed in the Court of Exchequer in the Case of the *King and Cotton*.

As to the Case of *Cole v. Davies & al'*, reported in 1 *Ld. Raym.* 724. "That no Action will lie against the *Sheriff*, who, after the Bankruptcy, seises and sells the Goods, under a *Fieri facias* to him directed;" (which is there said to be ruled by Lord Ch. Just. *Holt* at *Nisi prius*, in *Hil. 10 Wil. 3.*) These Notes were taken in 10 *W. 3.* when Lord *Raymond* was young, as short Hints for his own Use: But they are too incorrect and inaccurate, to be relied on as Authorities. The Note states four general Resolutions upon Evidence, in a Trial at *Nisi prius*; but does not state the Case or Question to which the Resolutions were applied: (Though, by the Particularity of the fourth Resolution, I conjecture *that* to have been most immediately adapted to the Case then in Judgment.) The first Resolution is an *Obiter* Reference to the Determination in *Baily and Bunning*; and it might not be at all material, to attend to the Distinction between Trover and Trespass. Besides, the Case there put is of a Sale by the Sheriff, *before the Commission*; and the Conversion might be as excusable as the Taking, *because he obeyed the Writ*: Whereas here, the Goods were not sold till AFTER both Commission and Assignment. It is a loose Note of what was said *Obiter*: It manifestly refers to the Case of *Baily and Bunning*; but is no Authority applicable to the present Case.

There are, in the Course of Trade, numberless Acts of Bankruptcy in *Fact committed*, where no Commission is ever taken out. Therefore it would be very hard, to make the Sheriff a TRESPASSER for TAKING the Goods of a Person who might *privately and secretly* have committed an Act of Bankruptcy, and perhaps many Years before too, and on which no Commission might ever afterwards issue, and which the Sheriff could not possibly know. But None of these Reasons hold, to justify the making a *false Return*, and *Selling the Goods after a Commission and an Assignment*.

Arguments have been urged from Inconvenience, if the Sheriff should be made liable; because He is *obliged* to sell.

But the Sheriff may take an *Indemnity* from the Plaintiff, in Case there be a Doubt concerning the Property of the Goods. Possibly, *this Court* might interfere, if the Sheriff was reasonably doubtful about the Property: At least, they would have given him *Time* to make his Return. Or he might have put it on the Parties concerned in Interest, to litigate their Right, by filing a Bill in Chancery against them, to oblige them to interplead, in order to *ascertain to whom* the Property belonged. Or He might *oblige* the Assignees to prove the Act of Bankruptcy, and the Assignment.

And notwithstanding what has been urged as to the Hardships that Sheriffs will be under, there can hardly a Case exist, where there will be any Hardship upon the Sheriff, where the Taking *and* Sale, or even the *Sale only*, are *SUBSEQUENT to the Assignment*. But in the present Case, the Sheriffs *knew* of the Bankruptcy, *before they sold* the Goods.

There are much *greater* Hardships upon *other third* Persons concerned in pecuniary Transactions with Bankrupts: Which Hardships they are nevertheless left subject to; because it was necessary that they should be so, in order to secure the *End* and Intention of the Acts relating to Bankrupts; namely, the Securing their Effects for the equal Satisfaction of their Creditors.

The Commission and Assignment are, both, *notorious* Transactions; so that a Sheriff cannot well be hurt, by being left liable to this Action: Whereas there would be Danger, if it were otherwise, of great Collusion being practised by Sheriffs, on these Occasions; which might be encouraged by a contrary Resolution. The *Seizure* here is after the Act of Bankruptcy committed, and therefore after the Property by Relation is vested in the Assignees: But *that* was *innocent*, and *excusable*; and the Sheriff shall *not* be liable by Relation, as a *WRONG-Doer*. The Gift of *this* Action is the *wrongful* CONVERSION, by the Sale; and *false* Return, long *after* the Commission and Assignment.

Therefore *per Cur.* unanimously, The Action is maintainable, in *this* Case, against the Defendants; and there must be Judgment for the Plaintiffs.

Judgment for the Plaintiffs.

Robinson *vers.* Robinson.

This was a Case out of Chancery, on a Will.

1 C. 2. Ves. 225. 5 Bro. P. C. Cas. 278.

ON the 27th of July 1723, George Robinson of Bockym in the County of Cornwall Esq; duly made his Will: And, after giving his Wife one Guinea, and his Father-in-Law a Groat, He devised as follows—" I bequeath ALL my Real Estate (excepting " my Estate in the Parish of Endellyon, late Mr. Newman's, and " all my Presentations in the said County,) to Lancelot Hicks of " Plymouth in the County of Devon Gentleman, for and during the " Term of his natural Life, AND NO LONGER: Provided that " He alter his Name, and take that of Robinson, and live at my " House of Bockym. And after his Decease, to SUCH Son as he " shall have, lawfully to be begotten; taking the Name of Robin- " son. And for Default of such Issue, Then I bequeath the same " to my Cousin [the Defendant] William Robinson, Rector of " Landewedneck and his Heirs for ever."

" Item. My Will and Desire is, That He [meaning William R. " Rector of Landewedneck,] have Liberty to present whom he " pleases to any Vacancy that shall happen in any of my Presenta- " tions, during his Life; and in Case any of his Children shall " take or be designed for Holy Orders, Then it is my Desire that " in Case of any Vacancy in either of my Presentations, that Bonds " of Resignation be taken, to such Child or Children, if the Va- " cancy happen before He or They attain such Orders: And after " the same shall be disposed of as aforesaid, Then I give the PER- " PETUITY of the said Presentations, to the said Mr. Lancelot " Hicks, in the same Manner, and to the same Uses, as I have given " my Estate."

And after bequeathing some Legacies, He gave all the Rest of his Goods and Chattels, together with his Estate at Endellyon, to his said Kinsman William Robinson; and made him sole Executor.

This William Robinson was Heir at Law to the Testator.

On the 30th of September 1728, The Testator died without Issue; leaving the said William Robinson his Heir at Law.

Lancelot Hicks was then living; and took the Name of Robinson: And, after the Testator's Death, had two Sons; George, his eldest; and

and the Plaintiff *Edmund*; (Both of them born after the Testator's Death.) And *Lancelot Hicks* entered upon the Estate, and lived at the Testator's House at *Bochym*. And his *Eldest* Son, *George*, was called by the Name of *Robinson*; and DIED in *March* 1738, an Infant; in the Life-time of the said *Lancelot Hicks*, his Father, and of the Plaintiff his younger Brother.

Lancelot Hicks, alias *Robinson*, died in *July* 1745; leaving the Plaintiff *Edmund Hicks*, alias *Robinson*, his ONLY SURVIVING Son, an Infant: Who brought his Bill in Chancery, to have a Conveyance.

Short State of the Case—The Title of the Plaintiff appears to be stated thus—That *Lancelot Hicks* took the Estate, and complied with the Condition; and then had two Sons born: The *Eldest* Son died an Infant, in his Life-time. Then *Lancelot* himself died: On whose Death, *William Robinson* claims the Estate; the *first* Devise “to the Son of the Body of *Lancelot*,” being already SATISFIED by the BIRTH and DEATH of *George*, *Lancelot's Eldest* Son, as the Claimant supposes.

Question. “Whether ANY, and WHAT Estate or Interest is vested in the Plaintiff *Edmund Robinson*, the Infant, (*Lancelot's* second Son,) by Virtue of the said Will.”

This Case was thrice argued: 1st in *P. 26 G. 2.* on 15 *May* 1753, by Mr. *Pratt* for the Plaintiff, and Mr. *Yorke* for the Defendant; Again, in *P. 29 G. 2.* on 14th *May* 1756, by Mr. *Norton* for the Plaintiff, and Sir *Antony Abdy* for the Defendant; And lastly, in *M. 30 G. 2.* on 23d *November* 1756, by Sir *Richard Lloyd* for the Plaintiff, and Mr. *Perrott* for the Defendant.

For the Plaintiff (*Edmund Robinson*), it was urged that the Testator certainly meant to give an Estate-Tail to Mr. *Lancelot Hicks* and all his Issue: And the INTENTION shall prevail, where it may. ^{Argument for the Plaintiff.} *Ow. 29. Cosen's Case. Cro. Jac. 448. King v. Rumball. Doe ex dimiss. Barnard v. Reason, Tr. 28 G. 2. B. R.* That the Estate to *Lancelot Hicks* was intended to be an Estate TAIL: but, at least, here is either an Estate in Fee, or for Life, in his Son, the Plaintiff.

As to the Condition, “to take the Name of *Robinson*,” the Estate must first VEST, before the Condition can be performed.

This is a Condition subsequent; as appears by *Plowd. 23. Colthirst v. Beiuskin*; and therefore has Nothing to do with the vesting of the Estate. *Cases in Chancery in Lord Talbot's Time* 166. Sir *John Robinson v. Camys*. “No particular technical Words are requisite, to make either precedent or subsequent Condition.” And
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it was holden by the Lord Chancellor, in the Case of *Trafford & Ux' v. Sir Ralph Ashton & al'*, 2 Vern. 661. That this Clause in a Will, "Taking on Him the Name and Arms of *Vavafor*," was a Condition *subsequent*, to defeat the Estate; and NOT *precedent*. Therefore They should lay this Condition out of the Case.

And then the simple Limitation will stand thus: It will be To *Lancelot Hicks* for Life; Remainder to SUCH SON as he shall have lawfully &c; Remainder (for Default of such Issue to the Testator's Cousin *William Robinson*, in Fee. This is the *simple* Limitation; putting the Condition subsequent, out of the Case.

First Point.

And this is intended to be an Estate Tail in *Lancelot Hicks*.

It may be objected, that this cannot be an Estate Tail in *Lancelot*; because here are no Words of Limitation: For that the Word Son is a Word of Purchase, not of Limitation, even if it was in the plural; and that here, "Son" is in the singular Number, "(and to such SON as he shall have, lawfully begotten;)" which, it may be urged, cannot be considered otherwise than as a Word of Purchase.

Another Objection may be raised, because it is limited to *Lancelot Hicks* himself for his Life, "And no longer:" And therefore it may be urged that the Court cannot raise an Estate Tail by *Implication*, contrary to these negative Words.

But if, The Word "Son" must here be taken as a Word of LIMITATION: Because otherwise it would not be agreeable to the Testator's manifest Intention, "that the Issue of such Son should have it afterwards, and that *William Robinson* should not take, till the Issue of *Lancelot Hicks* should be All of them extinct".

The Change of Name shews that the Intention of the Testator extended to the whole Family of the *Hickses*. So do the Words "lawfully to be begotten": Which Words properly belong to Estates Tail. So, "for Default of such Issue."

The Words will bear this Construction. They are, "To such Son as he shall have, lawfully to be begotten:" i. e. lawfully issuing from his Body.

"Son" is, here Nomen COLLECTIVUM. *King v. Melling* is in Point: And so is *Byfield's Case*, there cited. (1 Ventr. 231.) And many other Cases there cited.

So that *William Robinson* was not to have it, TILL *Lancelot Hicks* should be dead without ANY Issue.

2dly, As to the Words "for Life, *and no longer*:"—There had been no Difficulty or Impediment, if the latter Words "*and no longer*" had not been added. 1 *Ld. Raym.* 203. *Luddington v. Kime.* 1 *Peere Wms.* 605. *Blackborn v. Hewer Edgeley.* 9 *Co.* 127. *b.* *Sunday's Case.*

And yet they have really no Force at all in them, beyond the former Words: They are certainly tautologous, and have no additional Effect. An Estate for Life was given by the former Words: And such an Estate can last no longer than that Life lasts.

In *Archer's Case*, 1 *Rep.* 66. *b.* it was ruled to be an Estate for Life in *Robert Archer*; Because it was an *express* Estate for Life, devised to Him. But Tautology does not make it *MORE express*.

1 *Ro. Abr.* * 837. is, in Point, contrary to what my Lord Ch. *J. Hale* is reported in 1 *Ventris* 231. in the Case of *King v. Melling*, to have said. He there cites from *Roll.* 839. (as that Report says) the Case of a Devise "to the Testator's Eldest Son, for Life, & "*non aliter*;" (For so, says he, were the Words, tho' not printed in the Book;) and after his Decease, to the Sons of his Body. This, says my Lord Ch. *J. Hale* was but an Estate for Life, *by reason* of the Words "NON ALITER."

* *Note*; This Case is cited in 1 *Ventr.* 231. as from *Rolle* 839: But that is a Mistake of the Page; for it is really in 1 *Ro. Abr.* Title *Estate*, Letter *P.*

But the *true* Reason of the Determination of that Case in *Rolle's* *Abridgment*, appears from what *Levinz* says in his own Argument of *King v. Melling*. [*V.* 2 *Lev.* 58, 59.] For *Coleman*, who argued "that *Bernard* took only for Life," had cited that Case from *Rolle* as an Authority on his Side. *Levinz*, *contra*, argued that *Bernard* took an Estate Tail. And in answering the Cases cited against him, He says, "And as to the Case 1 *Rol.* It there appeared, the *Devisor's Intent* was that the Father should be only Tenant for Life, the Estate Tail to the Son: For that the *Clause to restrain Alienation* is added *only* to the Estate of the Son." So that if this was not a Mistake of the Reporter, it is, at the most, but an extrajudicial Opinion of a single Judge, and not the Point of the Case then under Consideration. Therefore *that* could not be the Principle of Law upon which that Case was determined: It must have been a *Regard* to the *Intention* of the Testator; and the particular Words must have been considered as a *Key* to that Intention. And the same Observation will hold with regard to the Cases of *Lodington v. Kime*, *Backhouse v. Wells*, *Lomax v. Homeden*, *Plunket v. Holmes*, and *Shaw v. Weigh*; and will serve to reconcile them.

The true Rule is, That where the Issue cannot take an Estate Tail, without taking it *through* the Father, the Father shall have an

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Estate Tail: Otherwise not. *Archer's Case*, 1 Rep. 66. Where the Estate is given over. *Cro. Eliz.* 313. *Clerk v. Day*. 1 Ro. Abr. 139. Letter U. pl. 4 S. C.

Backhouse v. Wells, in *Equity Cases Abr.* 184. pl. 27. in *Trin.* 11 Ann. B. R. "Devise to J. B. for his Life ONLY, without Impeachment of waste." J. B. was not MEANT to be Tenant in Tail. [See *Fortescue's Reports* 133. and *Lucas* 181. S. C.]

Langley v. Baldwin, is in *Equity Cases Abr.* 185. pl. 29. said to have been certified to be an Estate for Life only. But this is a Mistake: For it was certified, [and so it appears, as Lord Mansfield said, by the Register's Book,] to be an Estate Tail.

However, the Principle of that Determination was, to pursue the Testator's Intention: Which was "that it should go to all the Children of his Grandson."

Loddington v. Kime, 3 Lev. 432. 1 Ld. Raym. 203. was an Estate devised to the Issue of the Issue Male. So no Violence done to the Intention, by construing the first Estate to be an Estate for Life.

Shaw v. Weigh, P. 1 G. 2. B. R. reversed in *Dom' Proc'*: And determined to be an Estate Tail. [See *Modern Cases in Law and Equity* 252, 382. *Fitz-Gibbons* 7. and *Parliament Cases*, of April 1729. and *Fortescue's Reports* 58.]

Be the Circumstances as they may, yet the Testator plainly means, not merely an Estate for Life to *Lancelot Hicks*; but he also means to give an Estate Tail to the *Hicks FAMILY*. Therefore let the Intention of a Life-Estate be never so strong, yet the Court will construe his plain and clear Intention for the Benefit of the FAMILY, to prevail.

Second Point. 2dly, But if it be not construed an Estate Tail, but "Son" be considered as a Word of Purchase; Then these Questions will arise: 1st, Who shall be the Taker? 2dly, At WHAT TIME? 3dly, WHAT ESTATE?

1st, The present Case was indeed uncertain at the Creation; though rendered certain, by the Event. And perhaps it was not a vested Remainder; from the Uncertainty who should take.

2dly, But supposing it to be a contingent Remainder, yet the original Uncertainty was removed within sufficient Time. The Limitation over seems to confine it to the Time of the Father's Death:

Death: And *then* the Plaintiff *Edmund* was the ONLY Son. And the contingent Remainder vests Time enough, if it vest *then*.

3dly, It is a Devise of all his Real Estate, except that at *Endel-lyon*: which alone would pass the Fee-simple. 6 Mod. 109. *Countess of Bridgwater v. Duke of Bolton*. 1 Salk. 236. S. C. *Scott v. Alberry*. Comyns 337, 340. *Ibbetson v. Beckwith*, reported by Mr. Forrester, in his *Cases in Equity*, pa. 157.

And the Exception shews that He did not mean the *Rest* to go to his Heir at Law.

The Testator plainly meant it to be a *Fee*: He would never oblige the Devisee to part with his Family-Name, and take his *Name*, only for an Estate for *Life*.

Then He gives the *Perpetuity* of all his Presentations in the same Manner as he had given his Estate: Which must mean a PERPETUITY in *both*; and consequently proves him to have meant a FEE in the Land.

And the Limitation over proves the same; viz. "That *William Robinson* was never to take, but on *L. Hicks's* dying WITHOUT "ISSUE." However, If this was not a Devise of a Fee, it must then be an Estate Tail. 1 Ventr. 225 to 232. *King v. Melling*. Moore 397. pl. 15. 1 *Anderson* 43. N^o 110. S. C. *Bendloe* 30. pl. 124 S. C.

But it is at least an Estate for *Life*: Otherwise, all this Part of the Will must be rejected.

The Counsel for the Defendant *William Robinson* made two Questions—First, What Estate is devised to *Lancelot Hicks*, the Father of the Plaintiff; viz. Whether for *Life*, or in *Tail*? Argument for the Defendant.

Secondly, If for *Life*; then whether the contingent Remainder is to vest UPON the Birth of a Son, during the Life of *Lancelot Hicks* the Father; (which, if it be so, has been satisfied by the Birth of *George Hicks*, the Son;) Or whether it vested ON the DEATH of the Father, in his THEN eldest Son; (which then eldest Son is the now Plaintiff.)

They laid out of the Case—

1st, The Words of Condition annexed to the Estate of the Father; conceding that they were Conditions *subsequent*, to defeat the Estate, and not precedent, to hinder it from vesting.

2dly

2dly, The *Son's* taking the Name: For they allowed that the Construction of the Words, *as to the Son*, must be the *same* as of those relating to the *Father*.

But they considered as material,

First Question.

1st, Whether the Estate to *Lancelot Hicks* be an Estate for *Life*, or in *Tail*. Which they subdivided into two other Questions; *viz.*

First, "Whether the Court CAN raise an Estate Tail by IMPLICATION, *at all*, in *this Case*; This being an EXPRESS Estate for Life, and even confirmed by *negative Words*."

Secondly, "Whether the Court can raise an Estate Tail by *Implication*, upon EITHER of *these Expressions*; *viz.* "After his Decease, to such SON as he shall have;" or, "and for Default of such Issue."

First—In the Case of *King v. Melling*, Lord Ch. Just. *Hale* was the first great Judge, who put the Cases together, to raise an Estate Tail by *Implication*. But succeeding Judges differed from Him: And in the Case of *Luddington v. Kime*, in 1 *Ld. Raym.* 204. Mr. Just. *Powell* argued against Lord *Hale's* Opinion; Ch. Just. *Treby* agreeing with Lord Ch. Just. *Hale*.

In 1 *Peere Wms.* 605. *Blackborn v. Hewer Edgely*, & *è contra*. Lord Chancellor *Parker* explodes that Opinion, "That Words of Implication should *not* turn an express Estate for Life into an Estate Tail:" And says "That a Devise to *A.* for Life; and after his Death without Issue, then to *B.* will give an Estate Tail to *A.* Yet this Construction would be directly contrary to the Words of the Testator.

But the present Case is within Lord Ch. Just. *Hale's* Distinctions. He says that "*Non aliter*" is sufficient to make it an Estate for Life *only*; *viz.* where the Devise is, "to *A.* for Life, & *non aliter*." 1 *Ventr.* 231.

In *Backhouse v. Wells*, *Fortescue* differs from Lord *Raymond* in the Account of it; and lays Stress upon the Word "*only*," as being explanatory and restrictive in a doubtful Case. [See *Backhouse v. Wells* reported by *Lucas*, fo. 181. and *Fortescue* 181. and cited in 2 *Ld. Raym.* 1439, 40.] And in *Bagshaw v. Spencer*, Lord Chancellor said it was determined upon the Word "*only*," in that Case of *Backhouse v. Wells*.

In *Bamfield v. Popham*, 1 *Peere Wms.* 54, 55. Lord Ch. Just. *Tevor* reasons against Lord Ch. Just. *Hale*. So also does Mr. Just. *Powell*, in the same Case, *fo* 57. And surely Nothing can be stronger than *express Words*, with *NEGATIVE Ones ADDED to them*. And they shall not be rejected; according to 2 *Bulstr.* 176. *Mirrill v. Nichols*; and 2 *Peere Wms.* 282. *Barker v. Gles. Plowden* 523.

In the Case of *Humphry v. Taylor*, 5th February 1752, The Court of Chancery held resulting Trusts to be rebutted by negative Words.

Goodtitle ex dimiss. Crofs v. Wadbold, Mich. 19 G. 2. C. B. was a Devise to the Testator's eldest Son, *ONLY for Life*; and in the Case of *Failure of Issue, &c.* it shall descend and come to his (the Testator's) Male Children, &c. And they held this to be an Estate for *LIFE ONLY*; because, being expressed to be given for Life *only*, with *Negative Words*, it could not be *enlarged by Implication*: And Lord *Hale's* Opinion in the Case of *King v. Melling*, and the Determination in *Backhouse v. Wells*, were there relied on by the Court of Common Pleas.

Now full report of this case in Willes's Rep. 592

2d Subdivision of the first Point, *viz.* Whether the Court can raise an Estate Tail by Implication, *upon either of these Expressions*; *viz.* "After his Decease, to such Son as he shall have;" or, "and for Default of such Issue."

And they argued that they could *not*. For

First, The Word "*Son*" must be taken as a Word of *PURCHASE*: "And from and after his Decease, to such *Son* as he shall have, lawfully to be begotton." "*Son*" is here a Word of *Purchase*; Whether it be taken singularly, or collectively.

If *ONE Son ONLY* be meant, Then the Words "for Default of such Issue," refer to such *Son*; taking an Estate for Life. And the Word "*Son*" is *singular*; Not collective, *here*. He might have used the Terms "*Heir*," "*Heir Male*," &c. 1 *Ventr.* 230. *Burley's* Case, there cited: Where the Remainder is limited to the next *Heir Male*. *Miller v. Segrave*, M. 10 G. 1. B. R. cited in *Robinson's Treatise of Gavelkind* 96. The Remainder was "to the next *Heir Male*:" (Which Case was cited, to shew the Construction of the Word "*Heir*," in the singular Number.)

In *Trollop v. Trollop* in C. B. (*v. Robinson on Gavelkind* 96.) *Eyre* argued against the Opinion of Lord *Coke* in the Case of *Clerke v. Day*, *Moore* 593. (the best Report of that Case.)

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They cited 2 *Ventr.* 311. *Burchet v. Durdant*, only to shew that no Application can be made of those Cases to the present.

2d Branch of this 2d Subdivision, viz. As to the Word "*Issue*."

This Word, taken *Technically*, is indeed a Word of *Purchase*.

King v. Melling was the first Case where it was holden to operate as a Word of *Limitation in a Will*.

The Word "*Children*" is less operative than the Word "*Issue*." Each of these is a *Nomen Collectivum*: But "*Son*" is *Designatio Personæ*; unless other Words explain it. 1 *Ro. Abr.* 837. Letter P, pl. 12, 13.

As to *Byfield's Case*, mentioned only in Lord Ch. Just. *Hale's* Argument in 1 *Ventr.* 231. and in no other Book—It comes the nearest to the present Case, of any other cited on the Part of the Plaintiff. The Word "*Son*" was there holden to be *Nomen Collectivum*. But there was no EXPRESS Devise to the Son: It is a Devise to *A*: "And if he dies, *not having a Son*, then to remain, &c. Whereas here, the Words are, "*to such Son as he shall have, lawfully issuing from his Body*."

But if "*Son*" be taken as a Word of *Purchase*—It is asked WHAT *Son* as meant? And *what Estate*?

Answer. It can mean but ONE Son: The Sons of *Lancelot Hicks* could not *all* take as Tenants in Tail, or as Joint-tenants. In the Case of *Lodington v. Kime*, 1 *Ld. Raym.* 206. Lord Ch. Just. *Treby* is very express on this Head, "That if he had been the Word *Son*, " it had been without Controversy."

2 *Leon.* 35. *Leonard Lovelace's Case*, [*Cro. Eliz.* 40. S. C. *Savile* 75. S. C.] and *Moore* 371. S. C. cited, is very strong to the same Effect. Devise to *A*. and to his Eldest Issue Male *de Corpore suo exeunti*; (or "*seniori exitui masculino suo*," according to *Moore* :) 'Tis only an Estate for Life in *A*. Remainder to his Eldest Son, &c, for Life.

In Canc': In another Part of this very (present) Case, on this very Will, 17th April 1733. Sir *Joseph Jekyll* held *Lancelot Hicks* to be intitled to an Estate for Life; Remainder to his Eldest (and but One) Son, for Life; Remainder to *William Robinson*, the Devisee over. This Cause was between the Widow of the Devisor; and *Lancelot*, the first Devisee. And the Deeds were brought into Court:

Court: Whereas they must have been delivered to *Lancelot*, if he had been Tenant in Tail. In 1734, Lord *Talbot*, on a Rehearing, was of the same Opinion. And We cite it for *their Opinions* only: We do not say that the present Plaintiff is *bound* by this Decree.

Then if ONE Son *only* could take, it follows, of Course, that the Words "And for Default of *such Issue*," are *restrained* to SUCH ONE SON ONLY.

And as to the Estate, It is only an Estate for *Life*, in that ONE Son: For here are *no Words of Limitation*, at all.

As to the Arguments drawn from the *Advowsons*, and the Obligation to take the Name of the Testator.—The *Advowsons* are given for the Benefit of any of *Lancelot's* Children that should go into Orders: And then the Testator gives the *Perpetuity* of them to *Lancelot Hicks* for his *Life*; and afterwards, to *such Son* as he shall have, lawfully issuing from his Body. Now it can never be supposed that the Testator meant to give *Lancelot* a Fee in the Land; *because* he gives Him the *Perpetuity* of the Livings. And the *latter* Devise shall be construed by and agreeable to the *former*: Consequently, neither did He mean to give *Lancelot's* Son a Fee, *because* he gave Him the *Perpetuity* of the Livings.

As to taking the Name—No Case has been determined, on *that* Point. And *Lancelot Hicks* is here enjoined to take the Name of *Robinson*; tho' the Estate is expressly given to Him "for *Life*," "and no longer."

By Mr. *Shepherd* of *Cambridgeshire's* Will, the Name of *Shepherd* is to be taken by the Tenant for *Life*. The Case of *Ibbetson v. Beckwith*, reported in Mr. *Forrester's Cases*, *pa.* 157, was a Devise to Testator's Mother for *Life*; after which, to his Nephew *Tho. Dodson*, if he will take his Name of *Beckwith*; if not, only 20 l. Lord *Talbot* thought *that* alone to be *too slight* a Ground for a Construction "that it should be a Fee to *Tho. Dodson*."

In order to make it an *Estate Tail*, the Expression ought to be *such* as will put it BEYOND all Possibility of Doubt: According to the Cases of *Langley v. Baldwin*, *Shaw v. Weigh*, and *Bamfield v. Popbam*.

The Case of *Coulson v. Coulson*, 2 *Str.* 1125. was by way of REMAINDER; not by giving the Father an Estate Tail; and is distinguishable from all those that have been mentioned.

Second Question (made by the Defendant's Counsel.)

The next Question is, "*When the Remainder shall vest ; viz. Whether this contingent Remainder in the Son is to vest upon the Birth of a Son, during the Life of Lancelot Hicks ; or not till upon or after the Death of Lancelot Hicks, (the Father.) [V. ante, p. 43.]*"

"After the Decease of *Lancelot Hicks*," (the Father) are the Words of the Will. Which can suspend it *no longer* than till the Birth of his FIRST Son : For, here are no Words to lead to a contrary Determination.

It must vest, either before the immediate Estate ceases, or *eo instante* that it does cease. *Hutton* 119. *Napper v. Sanders*. *Chancery Cases* 33. *Sackville v. Lockwood*.

Swinburn, part 7. c. 11. proves "that the Words shall *not* relate "to the Time of the Testator's DEATH ; but to the Time of "MAKING the Will." And at that Time *Lancelot Hicks* had no Son ; nay, nor even at the Time of the Testator's Death. A contingent Remainder must take Effect, as soon as any Person is born, who comes within the Description : It can remain no longer contingent. Therefore it *here* VESTED by the BIRTH of a Son ; and was THEN and THEREBY SATISFIED : The Estate for Life vested in Him, on his Birth ; and ceased with Him, on his Death ; and then went over to the Defendant *William Robinson*, the Devisee over.

Indeed the Son *might* have been born between the making the Will, and the Death of the Testator ; and have died before the Testator. *Thrustout v. Peak & al'*, 1 *Strange* 12. And so, in the Case of *Lomax v. Holmden*, 2 *July* 1749, in *Canc.* A Son was born and died, in the Life-time of the Testator. But here, the Testator died *before* either of *Lancelot Hicks's* Sons was born. Here the Elder Brother (*George*) was the first who could take, after the Death of the Testator.

And as to the Intention of the Testator—It is out of the present Case : For the INTENTION of the Testator CANNOT be pursued by ANY Construction upon *this* Will, without straining the Rules of Law.

Therefore the Plaintiff can take Nothing by it.

Reply.

The Plaintiff's Counsel replied, That the Word "*Son*" is here a Word of Limitation.

Some Words are Words of Purchase ; and may, by Circumstances, be turned into Words of Limitation : Others are, *prima facie*

facie, Words of Limitation; and may, *by Circumstances*, be turned into Words of Purchase. The Words "Son, Children, Issue, and Heir," in a Will, where no Son is in Being at the Time of the Devise, are *nomina Collectiva*, and sufficient (in a Will) to create an Estate of Inheritance.

Now, *here ARE such Circumstances* as shall determine the Word "Son" to be, *HERE in this Will, a Word of Limitation.*

The Case of *Taylor v. Sayer*, 41 *Eliz.* is not Law: Lord Ch. Justice *Hale* says, "it is too rank." [1 *Ventr.* 229.]

They agreed to the Case of *Trollop v. Trollop*; as the Words stand singly there: But alledged the Rule to be, "That the INTENTION of the Testator shall *fix the Construction* of such Words, as MAY be construed *either* as Words of Limitation, or of Purchase."

And if this Word "Son" be a Word of *Limitation*, then what hinders this from being an *Estate Tail*? And they insisted that this was so. And They said that though here was a necessary Implication, yet they needed not to rely singly on it's being an Estate-Tail by IMPLICATION: For here is even an EXPRESS *Estate Tail* devised.

In the Case of *Shaw v. Weigh*, The Intention was plain: But the *apparent Intention* "to give an *Estate Tail* to the Issue, overruled it. And this is the last Case, in Point of Time.

In the Case of *Backhouse v. Wells* it is not agreed, *which* of the two Expressions the Court went upon: *Viz.* "without Impeachment of Waste; or, "for his natural Life only."

Therefore they concluded that the Plaintiff is intitled to an Estate Tail, in the present Case.

2dly, The Son must be *such* a Son as could take.

They said, they never contended, that the Sons should take as Joint-tenants, or Tenants in Common: They were to take *in Succession*.

The Word "Son" may be here enlarged into "Issue". It does not at all appear that the Testator meant *Lancelot's Eldest Son*, and his *Eldest Son ONLY*: On the contrary, His Intention appears to be the ISSUE MALE of *Lancelot*, Generally.

And the Cases cited by the other Side do not prove their Point. For in 2 *Leon.* 35. *Leonard Lovelace's Case*, the Word "Eldest"

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was expressly added to the Words "*Issue Male*;" (the Devise being "to the Father, and to his Eldest Issue Male:") So that it was the same as "*Eldest Son*;" and it better answered the Testator's Purpose, that the Children of this Devisee should take as *Purchasers*.

As to the Determination said to have been made in 1733 and 1734, of this Point, *upon this same Will*, by Sir Joseph Jekyll, and Lord Chancellor Talbot; The Widow of the Testator there claimed *paramount* the Will; She brought a Bill to establish her Jointure: And there was indeed a Cross-Cause. But *Non constat*, what *Lancelot* claimed; nor does it appear how it was defended. However, it is plain, that the *present* Lord Chancellor does *not* rest satisfied with these Opinions: Because *He* has sent it hither for the Opinion of *this Court*.

The Words, "Such Son" must let in *All Sons*; and cannot exclude *ALL Sons BUT* the Eldest. It was a contingent Remainder, that the Court will keep open, till there is a Necessity to determine it. And there is no Need to determine it, (for there is no Need that the Remainder should vest,) *TILL the Death* of the Tenant for Life: *Then* indeed it must vest, *eo instante*.

In *Hutton* 119. and in *Chancery Cases* 33. It was an *Eldest Son*: Whereas here it is not necessarily an *originally Eldest Son*; but may be any *other Son*, who *BECOMES Eldest* before the contingent Remainder vests.

ALL the Sons of *Lancelot* could *not* take, *unless* the Father took first: A *Posthumous* Son certainly could not.

As to the contingent Remainder vesting—It is *enough* if it vested *eo instante* that the particular Estate determined.

And as to the Devise of the *Perpetuity* of the Advowsons, the latter Devise is not to be construed *by the former*: But both the former and the latter Words are to be taken *together*, and a reasonable Construction made upon them, agreeable to the general Intention of the Testator.

Upon the whole, This is an Estate either in *Fee*, or in *Tail*; or at lowest, for *Life*.

The JUDGES OF THIS COURT, on the 1st of *December* 1756, unanimously CERTIFIED to the Court of Chancery, in the Words following:

" We are of Opinion, That, Upon the true Construction of the
 " said Will of the Testator *George Robinson*, the said *Lancelot Hicks*
 " must, by *necessary Implication*, to effectuate the *manifest general*
 " *Intent*

“ *Intent* of the said Testator, be construed to take an Estate in
 “ *Tail Male*, He and the Heirs of his Body taking the Name of
 “ *Robinson*; NOTWITHSTANDING *the* EXPRESS Estate devised to
 “ the said *Lancelot Hicks* “ for his LIFE and NO LONGER.”

Note; The Course has always been, for the Judges not to give any *Reasons, in Court*, upon a Case sent out of Chancery for their Opinion. But the above Certificate seems carefully penned, to mark the Grounds upon which it was founded.

The Estate Tail is said to vest in *Lancelot Hicks*, the Father. The *manifest Intent* of the Testator, expressed by his Will, was, that the Estate should *not* go over to his *Heir at Law*, till Failure of Issue Male of *Lancelot Hicks*.

The Difficulty was, how to mould an Estate *agreeable to the Rules of Law*, to effectuate the Testator's Intent; and to construe his Sense and Meaning into *apt Words of Limitation*.

IF the Father could have taken an Estate for Life, and the Sons successively an Estate in Tail Male, the whole Intention of the Testator would have been *better* answered: For, by *such* Construction, *All* the Words in the Will would have received their natural Sense and Meaning, *without rejecting* any Words; and None should be rejected, *unless* the Testator's Intent cannot be otherwise attained. But THAT could *not* be, by Law. An Estate to the Heirs Male of the Body of *Lancelot Hicks* is *implied*, though an Estate for Life only is *given* to Him; because the Testator's Heir was not to take, *till Failure* of such Heirs Male. But by Law the Testator could, by *no* Words, have made the Father Tenant for Life, and the Heirs Male of his Body *Purchasers*.

If He had devised “ to the Father for Life, Remainder to the “ Son for Life, Remainder to the Heirs Male of the Body of the Father;” Or “ to the Father for Life, Remainder to “ the Son, and the Heirs Male of the Body of the Father:” In *either* of these Cases, the *Father* must have taken an Estate in *Tail Male*. The Case put in *Lit. Sec. 30.* and the Determination mentioned in Lord *Coke's* Comment upon that Section, (in *pa. 26. b.*) on the Gift “ to *Roberge* and to the “ Heirs of *John de Mandevile*, her late Husband, on her Body “ begotton,” are no Exception to this Rule: For, in *both* Cases, the *Father* was DEAD at the Time of creating the Entail.

It is said too, “ That he must, by necessary Implication, to effectuate the manifest general Intent of the Testator, be construed

“strued to take an Estate in Tail Male; NOTWITHSTANDING the *express* Estate devised to him, for his Life, and “no longer.”

Those Words seem intended to express the *governing Reason* in this Case, to have been the *manifest main Intent* of the Testator, collected from all the Parts of his Will taken together; *without shaking* the Authority of *Backhouse v. Wells*, and other Cases, which have laid a Stress upon the Words “only,” “not otherwise,” or *like Expressions*, after an Estate for Life together with other Clauses and Circumstances in Favour of the manifest Intent of a Testator, to make the Issue or Heir take as a Purchaser designed by a Personal Description.

This Certificate was confirmed in Chancery; and a Decree made accordingly.

ON APPEAL to the House of Lords from that Decree, The Opinion of *All the Judges* was asked. It was delivered by Lord Ch. Baron *Parker*, with the Reasons at large: And they unanimously agreed with the above Certificate, *upon* the above Grounds suggested thereby.

Whereupon the Decree was affirmed by the Lords, on the 14th of February 1758.



REGULA GENERALIS.

Friday 26th
November
1756.

The Court declared a new Order concerning *Special Causes* in the Paper: Which was, in Substance, That all Causes should come on to be argued, in the *same Order* that they were entered; and that they should *continue* to stand in the Paper, in the same Order, *till* they should be argued, (without being entered anew :) And that no Cause should be put off, without a special Application to the Court, upon some sufficient Ground, before the Day upon which it stood in the Paper for Argument.



Note;

It may not be amiss, to mention a general Rule for *intitling* all Cases arising upon ORDERS OF REMOVAL: The Want of knowing, or the Want of attending to which general Rule, has been the Occasion of infinite Confusion in tabling and citing Cases of this Sort.

The constant Method of entering them in the *Rule-Book*, is to name the *King* as *Prosecutor*; and the *Parish* last charged with the Paupers, and consequently *Appealing* to this Court, as *Defendants*. For instance—Two Justices remove a Pauper from *A.* to *B.* And

B. appeals to the Sessions. If the Sessions *confirm* the Order, and *B.* brings the *Certiorari*, the Rule thereupon is intitled "*Rex* *versus Inhabitantes de B.*" But if the Sessions *discharge* the original Order, and consequently *A.* remains charged with the Pauper, and brings a *Certiorari* to remove the Orders, then the Rule bears for it's Title, "*Rex versus Inhabitantes de A.*"

Rex vers. Inhab. de Aythrop Rooding.

Monday 29th
November
1756.

[Mr. Justice *Wilmot* was absent; sitting in Chancery as one of the Commissioners of the Great Seal.]

See this Case *abridged*, in the Table; and *at large* in the Quarto Edition of my SETTLEMENT CASES, N^o. 131. p. 412.

* Farewell Esq; *vers.* Chaffey and others.

* Page 54.
[See the Note
at the bottom
of this Page.]

THIS Cause was tried upon the Western Circuit, the last Summer Assizes, before Mr. Serjeant *Willes*; who certified "That the *Weight of the Evidence* was against the Verdict." But a new Trial was denied, upon the Nature of the Action, the Value of the Matter in Dispute, and other Circumstances of the Case. †

The same
Day.

† *V. Ante*, pa.
11, 12. *Mac-
crow v. Hull*
S. P. and
Post pa. 664.
Dr. Burton v.
Thompson, M.
1758. S. P.

Lord Mansfield said, A NEW TRIAL ought to be granted, to attain REAL Justice; but not, to gratify litigious Passions, upon every Point of *Summum Jus*; and cited *Smith v. Bramston*, and *Smith v. Frampton* in 2 Salk. 644; and an anonymous Case there also mentioned, of P. 8 W. 3. B. R. and likewise *Smith v. Page*, M. 8 W. 3. B. R. *ibidem*; also *Deerly v. The Dutcheffs of Mazarine*, H. 8 W. 3. B. R. 2 Salk. 646. and *Sparks v. Spicer*, H. 10 W. 3. B. R. in the same Book, pa. 648. To which may be added, What is said by the Court, in the Case of *Dunkly v. Wade*, P. 5 Ann. 2 Salk. 653.

In these Cases, the Verdicts were against Evidence and the strict Rule of Law, or obtained through Surprise: But the Court would not give a Second Chance of Success to a hard Action, or an unconfessionable Defence.

NOTE. The Pages of this Edition tally to the Pages of the former Edition, excepting those only which immediately follow the omitted SETTLEMENT CASES.

P

Therefore

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Therefore The COURT, upon the *same Principles*, refused to grant a New Trial in the present Case, and discharged the Rule to shew Cause why there should not be One.

Rex *vers.* Joseph Smith.

AN Indictment for a Nuisance had been removed, by *Certiorari*, from the Quarter-Sessions in *Devonshire*, into this Court, by the Defendant: Which Indictment was afterwards tried, and the Defendant was found Guilty. He then moved in Arrest of Judgment: But his objections were over-ruled. After which, the Prosecutor moved for his Costs; and obtained a Rule to shew Cause. And now Mr. Serjeant *Hewitt*, on Behalf of the Defendant, shewed Cause, "Why the *Prosecutor* should not have his *Costs*, before the "Recognizance should be discharged; and why it should not be "referred to me, to tax such Costs."

His Cause was this, That *No Name* of any Person *as being* either the Party grieved or injured, or a *publick civil Officer*, is INDORSED upon the Indictment, according to the Directions of 5, * 6 *W. & M. c. 11. § 2 & 3*. And he argued that *without* such INDORSEMENT, no Costs were payable to the Prosecutor.

* P. 55.
* See the
Note at the
bottom of
Page 53.

Mr. *Hussey contra*, for the Prosecutor, acknowledged that there was no Name indorsed: But, at the same Time, insisted that an INDORSEMENT of the Name of the Prosecutor, as being the Party grieved or injured, or a civil Officer, is *not at all necessary*, in order to the Court's giving him Costs; though the 2d Section does indeed *direct* the Recognizance to be certified into this Court, with the *Certiorari* and Indictment, and the Name of the Prosecutor (if he be the Party grieved or injured) or some public Officer to be indorsed on the Back of the Indictment.

He said He had an AFFIDAVIT "That the Prosecutor *was* a "civil Officer, &c." And the Words of the 3d Section of the Act "are that *if He be so*, the Recognizance shall not be discharged, "till the Costs shall be paid." But the Act does *not* say "That "the Prosecutor shall *not* have his Costs, *unless* his Name be "INDORSED."

Lord MANSFIELD: It is enough if it be PROVED "That the "Prosecutor was a civil Officer, &c. And here it *is* proved, by *Affidavit*: Which is sufficient.

Rule made absolute for the Prosecutor's having his Costs, (to be taxed by Me *ut supra*,) before the Recognizance should be discharged.

Shadwell

Michaelmas Term 30 Geo. 2.

Shadwell Esq; *vers.* Angel Esq;

THIS was a long Litigation concerning the Regularity of a Judgment; which, on Mr. Nares's Motion (*ex parte Def'*) had been referred to the Master, who thought it irregular: And now Mr. Norton (*ex Parte Quer'*), appealed to the Court, from the Master's Opinion.

The Question depended upon the Meaning of a Rule of this Court, made *M. 10 Geo. 2. 1736.* and upon the Practice of the Court, pursuant to that Rule.

The Import of this Rule was, that upon Proceſs returnable the 1st or 2d Return of a Term, a Plaintiff may (in certain Cases) deliver a Declaration *de benè eſſe*, at the Return of the Proceſs; *with NOTICE* "for the Defendant to plead within *Eight Days after* " *Delivery* of the Declaration:" And if the Defendant shall not file Common Bail, and plead within ſuch Eight Days after, &c, the * Plaintiff (having firſt filed Common Bail for ſuch Defendant accor- * P. 56. ding to the then late Act for preventing frivolous and vexatious Arreſts,) may ſign Judgment for want of a plea, a Rule to plead being duly entered.

The preſent Fact was, That the proceſs was returnable on *Saturday 15th November* (the 2d Return of the Term.) The Declaration, with Notice "to plead in 8 Days," was LEFT *in the Office* on *Monday* the 24th of *November*: And upon the Defendant's not pleading within the 8 Days, nor even before the Time of ſigning the Judgment; the Plaintiff on the 3d of *January* (6 Weeks afterwards) filed Common Bail for the Defendant, and (a Rule to plead having been duly entred) ſigned Judgment *upon the SAME Day*.

The Maſter, Mr. *Clarke*, thought this to be irregular; For that when the Defendant was once in Court, the Plaintiff ought to proceed againſt him *as being* in Court: By which Expreſſion he ſeemed to mean, either that the Plaintiff ſhould deliver a Declaration *a freſh*; or that He ſhould give a *freſh* Rule to plead.

And Mr. *Nares* (in ſupport of the Maſter's Opinion) urged that when the 8 Days (the Time for pleading) are out, the *de benè eſſe* Declaration is at an End. And he mentioned a Caſe of *Llewellyn v. Skyrme*, as in Point.

But Mr. *Norton* denied this; and ſaid that the 8 Days were *not* out; but the Declaration *de benè eſſe* was delivered *within Time* (though

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(though not indeed till the 9th Day;) because there were *two Sundays* included, viz. 16th and 23d of Nov. And that the Plaintiff might have signed his Judgment on *Tuesday* the 25th.

Master *Clarke* was, at first, inclined to think that the *Sunday* was no Excuse; and that this was not a sufficient Reason to allow the Plaintiff Time till the 9th Day, for delivering the Declaration *de benè esse*. But all the Officers thought otherwise; And the Court seemed to think so too: Whereupon Master *Clarke* seem'd to give that Point up.

The COURT were of Opinion that the Judgment was regular.

Lord *Mansfield* was clear, that No *further* Notice (besides that given on delivering the Declaration *de benè esse*) was necessary.

Mr. Just. *Denison* said the Defendant had 8 Days AFTER the Delivery of the Declaration *de benè esse*, whenever it may be delivered (either sooner or later.)

* P. 57. * And this was *left in the Office*, (which He held to be a good Delivery,) on the 24th, which was *within Time*; And the Defendant did *not* plead within 8 Days; Whereupon, the Plaintiff files Common Bail for Him, upon the 3d of *January*; and signs Judgment the *same Day*: Which is regular; For the Rule is *complied with*, and the Defendant is not at all hurt; on the contrary, He has had *longer Time* than he was intitled to.

Mr. Just. *Foster*. The whole Objection is "That the Plaintiff has not proceeded with so much Speed as He *might* have done:" For he *might* have signed his Judgment on the 25th of *November*. The Defendant might have filed Common Bail for *Himself*, if he had thought proper: And then he might have had a fresh Rule to plead.

By the COURT unanimously, The Rule of Reference to Master *Clarke*, for Irregularity in this Judgment, was discharged.

MEMO-

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MEMORANDUM.

The new Lord Chief Justice, at his first setting out, instituted a *different Method* of going through the *MOTIONS at the Bar*, from that which had been usually (and indeed almost universally) practised heretofore: Which new Method was not only advantageous to the younger Part of the Barristers, but also exceedingly convenient to the Suitors, as it took away that Delay to Business which arose *from the* unreasonable Preference hitherto given to Gentlemen within the Bar. For, the *repeated* Pre-Audience, hitherto allowed them, had thrown almost the whole Business into their Hands: Which, as they were intitled to move only once in a Day, could not be sufficiently dispatched.

The Course had been, ever since I remember, and was in Lord Ch. Just. *Holt's* Time, (as the late Mr. Justice *Page* has often told me,) “to BEGIN, EVERY DAY, with the *Senior* Counsel within the Bar, and then to call to the next Senior, in Order, and so on, as long as it was convenient to the Court to sit; and to proceed again in the same Manner, upon the *next*, and EVERY *subsequent* Day; although the Bar had not been half, or perhaps a quarter gone through, upon any One of the former Days: So that the Juniors were very often obliged to attend in vain, *without being* able to bring on their Motions, for many successive Days.”

This was the *settled* and *general* Rule: Though perhaps the Judges, out of mere Compassion to the Juniors, would 2, or 3 * Times in a Term, give them Leave, to move, upon the next Day, * P. 58. such Motions as were real *Remanets* of the former Day.

Whereas Lord *Mansfield* professed and most punctually practised the *going* QUITE THROUGH the Bar, even to the youngest Counsel, before he would begin again with the Seniors; even though it should happen to take up two or three or *more* Days, before all the Motions which were ready at the Bar upon the first Day, could be heard.

The End of *Michaelmas* Term 30 Geo. 2. 1756.

* Hilary Term

30 Geo. 2. B. R. 1757.

(Lord Commissioner *Wilmot* absent, in Chancery.)

Kilwick *vers.* Maidman.

Monday 24th
January
1757.

TIME was given by a Judge's Order to plead; (*viz.* until 2 Days before the Effoin-Day of this present Term;) on the usual Terms, "of pleading *issuably*, &c. This Order was not obtained till after the Four-Days Rule for pleading was expired. BEFORE *the* Term, and *within* the Time allowed by the Judge's Order, the Defendant pleaded a Plea of *Tender*; Which Plea was intitled (as it was agreed that it regularly might,) as of the *preceding* Term.

Mr. *Aspinall* moved, *ex parte Quer'*, to set *aside* this Plea, with Costs, as irregular; and for Leave to sign Judgment: and cited 1 *Barnes* 246. *Daevenbill v. Barrit*, in Point.

Mr. *Winn pro Def.* shewed Cause; *viz.* That it was a *fair honest Plea*, in it's own Nature; And that it was *within Time*, not being after Imparlance, but *as of the LAST Term*; And also that it was an *ISSUABLE Plea*, within the Meaning of the Judge's Order: Though He acknowledged that a Plea in *Abatement*, (though in Strictness indeed *issuable*,) would *not* be so; because it tended to delay the Plaintiff.

The COURT concurred entirely in what Mr. *Winn* had urged in Support of the Regularity of the Plea: And the Motion was denied.

Taylor

Hilary Term 30 Geo. 2.

* Taylor, ex dimiss. Atkins Esq; vers. Horde Esq; & al'. * P. 60. 3. 8.
J. C. S. Bro. Parl. Cas. 247. See also 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

IN Ejectment brought in Michaelmas Term 1752, by John Atkins Esq; (in the Name of Cyprian Taylor) against Robert Atkins Esq; the Heir at Law, and Others; Upon the General Issue pleaded, and Issue joined thereon and tried at the Bar of this Court, the Jury find a Special Verdict: Which was, in Substance, as follows.

That Sir Robert Atkins the Elder, Knight of the Bath, on 8th June 1669, was (amongst divers other Messuages, Lands, Tenements, &c, in Gloucestershire,) seised in Fee of the Manor of Lower Swell and the other Premises in Question; and being so seised, made and executed Three several Indentures, (which are set out in the Special Verdict :) One of which is dated on the 11th and the two others on the 12th of June 1669.

By One of these Indentures, which was dated on the 12th of June 1669, (which the Counsel on both Sides, for Distinction's Sake, called the lesser Deed,) made between Sir Edward Atkins Knt. One of the Barons of the Exchequer, Sir Robert Atkins Knight of the Bath, Solicitor General to the Queen and Son and Heir apparent of the said Sir Edward, and Dame Mary (Wife of the said Sir Robert) Atkins, of the one Part; and Sir Edward Carteret Knt. and John Lowe Gentleman, of the other Part; It is witnessed that in Consideration of a Marriage thentofore had and solemnized between the said Sir Robert Atkins and Dame Mary his Wife, and of her releasing and acquitting a former Jointure to Her made before Marriage, and of a new Provision to be had and made for Her the said Dame Mary, for and in the Nature of a Jointure, in Bar and Recompence of her Dower and Thirds at the Common Law, in Case She should happen to survive and over-live the said Sir Robert Atkins her Husband, He the said Sir Robert Atkins did thereby covenant and grant to and with the said Sir Edward Carteret and John Lowe, That He the said Sir Edward Atkins, and the said Sir Robert Atkins and Dame Mary his Wife, should and would, before the End of Michaelmas Term then next ensuing, levy and acknowledge before the Justices of the Court of Common Pleas at Westminster, One or more Fine or Fines Sur Conusance de Droit come ceo, &c, unto the said Sir Edward Carteret and John Lowe, with Proclamations, of the said Manor of Lower Swell and the other Premises in Question: Which said Fine or Fines so as aforesaid or in any other Sort to be had, levied and executed, of the said Manor and Premises alone or together with any other Lands, Tenements or Hereditaments, by or between the Parties to the said Indenture

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* P. 61. * or any of them, alone or together with any other Person or Persons, were to be and enure, and were thereby declared to be and enure, as to the said Manor and all other the Premises, To the Use of the said Sir Robert Atkyns for Life, without Impeachment of Waste; and from and after his Decease, To the Use of the said Dame Mary for Life for her Jointure and in Bar of her Dower; and from and after the Decease of the said Sir Robert and Dame Mary, To the Use of Sir Robert Atkyns Knt. Son and Heir apparent of the said Sir Robert, and the Heirs Male of the Body of the said Sir Robert the Son, on the Body of Lovis Carteret his intended Wife lawfully to be begotten; and for Default of such Issue, to the Use of the Right Heirs of the said Sir Robert the Father for ever.

And the said Sir Edward Atkyns and Sir Robert the Father did by this Deed covenant with the said Sir Edward Carteret and John Lowe and their Heirs, That in Case any Defect should happen in the said Fine and that Assurance, Or in Case there should not be some good Conveyance in the Law made according to the Intent of that Indenture, so that by Reason of such Defect or Failure of such Conveyance and Assurance in Law, the said Manor and Premises or any Part or Parcel of them should not, before the thirtieth Day of November then next ensuing, be sufficiently conveyed according to the Intent of the said Indenture, then they the said Sir Edward Carteret and John Lowe and their Heirs, and all and every other Person and Persons and their Heirs, standing or being seised, or which should stand or be seised of and in the said Manor and Premises, should and would from Time to Time and at all Times from thenceforth for ever stand and be seised of and in the said Manor and Premises, or so much and such Part and Parts thereof whereof or concerning which any such Defect should happen to be, To the Uses Behoofs Intents and Purposes therein before declared, limited and contained, according to the true Intent and Meaning of the said Indenture, and to none other Use, Intent or Purpose whatsoever.

11. & 12. June 1669. One other of these three Indentures was a Lease, dated 11th June 1669: And the Remaining One was a Release, dated 12th June 1669. This Release bore the very same Date with the Deed already recited (called the lesser Deed:) And the Counsel on both Sides agreed in calling this Deed of Release (for Distinction's Sake) the greater Deed, as this contained the Settlement of the whole Estate. *between the son Sir Robert & Miss Lovis Carteret &c. to uses. — The uses as in manor of Jewell & the other* By these Indentures of Lease and Release, dated 11th and 12th June 1669, the Release being Tripartite, and made between the said Sir Edward Atkyns, the said Sir Robert the Father and Dame Mary his Wife, Philip Sheppard Esq; Sir Clement Farnham Knt. and Edward

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* *Edward Atkyns* Esq; (second Son of the said *Sir Edward Atkyns*,) of * P. 62.
the first Part; the Right Honourable *Sir George Carteret* Knt. and
Bart. Vice-Chamberlain of his Majesty's Household, and One of
his Majesty's most Honourable Privy Council, the said *Sir Edward*
Carteret and the said *John Lowe*, the Right Honourable *Edward*
Montagu, commonly called Lord *Hinchinbrooke* (Son and Heir ap-
parent of the Right Honourable the Earl of *Sandwich*,) *Sir Philip*
Carteret Knt. (Son and Heir apparent of the said *Sir George Carte-*
teret,) and *Edward Swift* Esq; of the second Part; and the said
Sir Robert Atkyns Knt. (the Son and Heir apparent of the said *Sir*
Robert Atkyns,) and *Louis Carteret* (one of the Daughters of the
said *Sir George Carteret* and of Dame *Elizabeth* his Wife,) of the
third Part; It is witnessed that in Consideration of a Marriage then-
tofore had and solemnized between the said *Sir Robert Atkyns* the
Father and Dame *Mary* his Wife, and also of a Marriage then
shortly to be had and solemnized between the said *Sir Robert Atkyns*
the Son and the said *Louis Carteret*, and of the Sum of 6500*l.*
paid to *Sir Robert the Father* by the said *Sir George Carteret*, for the
Marriage Portion of the said *Louis Carteret*, and of 5*s.* a-piece to
the said *Sir Edward Atkyns*, *Sir Robert Atkyns* the Father, *Philip*
Sheppard, *Sir Clement Farnham*, and *Edward Atkyns*, paid by the
said *Sir Edward Carteret* and *John Lowe*, and for a Provision to be
had and made to and for the said Dame *Mary* (Wife of the said
Sir Robert Atkyns the Father,) for and in the Nature of a *Jointure*,
in Bar and Recompence of her Dower and Thirds at the Common
Law; and also for a Provision for the said *Louis Carteret*, for and
in Nature of a *Jointure*, in Bar and Recompence of her Dower and
Thirds at the Common Law; and for settling All the Manors,
Lands, Tenements, and Hereditaments therein after mentioned, to
the several and respective Uses, upon the Trusts, to the Intents and
Purposes, and with under and subject to the Provisoes Declara-
tions Limitations and Agreements therein after declared; The said
Sir Edward Atkyns and *Sir Robert* the Father did grant release and
confirm unto the said *Sir Edward Carteret* and *John Lowe* and their
Heirs, the said Manor of *Swell* and other the Premises in Question
(as described in the lesser Deed,) and several other Manors Lands
and Hereditaments therein mentioned, To hold the said Manor of
Swell and other the Premises in Question, to the said *Sir Edward*
Carteret and *John Lowe* and their Heirs, to the several Uses therein
mentioned; which Uses, (as to the said Manor of *Swell* and other
the Premises in Question,) are the same as those before set forth in
the lesser Deed; viz.

To the Use of *Sir Robert* the Father, for Life, without Impeach-
ment of Waste;

R

Remainder

Hilary Term 30 Geo. 2.

* P. 63. * Remainder, as to the said Premises (except Timber-Trees,) to Dame *Mary* for Life, for her Jointure, and in Bar of Dower ;

Remainder to Sir *Robert* the Son, and the Heirs Male of his Body by the said *Lovis Carteret* ;

Remainder to the Right Heirs of Sir *Robert* the Father.

And several other Parts of the Estates were limited thereby, to Sir *Robert* the Son, for Life ; Remainder to Trustees, to preserve contingent Remainders ; Remainder to the said *Lovis Carteret* for Life, for her Jointure and in Bar of Dower ; and upon the Issue of the said intended Marriage, in strict Settlement.

3 In which Indenture of Release is contained a Proviso, in the following Words—

“ Provided always that it shall and may be lawful to and for the
“ said Sir *Robert Atkyns* the Father, the said Sir *Robert Atkyns* the
“ Son, and the said *Lovis Carteret*, respectively, when they are or
“ shall be respectively seised in Possession of the Freehold of such of
“ the Premises as by Virtue of and according to the Limitations
“ aforesaid are respectively limited to them for their respective
“ Lives, by their respective Deed or Deeds in Writing sealed and
“ delivered in the Presence of two or more credible Witnesses, to
“ make any Lease or Demise, Leases or Demises, of all or any of the
“ said Premises whereof they shall be so respectively seised in Pos-
“ session for Life as aforesaid, (Except of the Capital Messuage of
“ *Sapperton* aforesaid, and the said Lodge in *Pinbury Park* afore-
“ said,) unto any Person or Persons, for One, Two or *Three Lives*
“ in Possession Reversion or Remainder, to end or determine upon
“ the Death of One Two or Three Persons, Or for the Term of
“ 21 Years absolute ; So as there be not, in the respective Pre-
“ mises or any Part thereof, any Estate exceeding the Term or
“ Time of *three Lives* or 21 Years, in Being at the same Time ;
“ and so as such respective Leases be not made without Impeach-
“ ment of Waste ; And so AS the USUAL RENTS of such of the
“ Premises respectively as shall be so leased or demised upon Fines,
“ And the BEST Rents that CAN BE reasonably gotten for such of
“ the Premises respectively as shall be so leased or demised without
“ Fines, BE respectively RESERVED upon every such respective
“ Lease or Leases Demise or Demises, to be PAYABLE DURING
“ the respective Terms in the said respective Leases or Demises to be
“ contained ; Any Thing herein before contained to the contrary
“ notwithstanding.”

And

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* And another Proviso is therein also contained, in the following * P. 64.
Words, viz.

“ Provided also that it shall and may be lawful to and for the said
“ Sir Robert Atkyns the Father, at any Time or Times during his
“ natural Life, *After* the Decease of the said Dame Mary his Wife,
“ by any Writing or Writings indented, under his Hand and Seal,
“ testified by two or more Witnesses, to grant, assign, limit or ap-
“ point the said Manor of *Swell inferior alias Nether Swell*, and
“ the Lands Tenements and Premises in *Swell inferior* otherwise
“ *Nether Swell, Upper Swell, and Stow in the Would*, and in either
“ or any of them, or such Parts and Parcels thereof as He shall
“ think fit, unto or to the Use of *such Woman or Women* as He the
“ said Sir Robert Atkyns the Father shall marry or take to Wife,
“ after the Decease of the same Dame Mary his now Wife; for and
“ during the Term of the *natural Life* or Lives of such Wife or
“ Wives only, for her or their Jointure or Jointures; Any Thing
“ herein contained to the Contrary thereof in any wise notwith-
“ standing.”

And by another Proviso in this Deed, the like Power is given to
Sir Robert the Son, “ to make a Jointure of all or any of the Lands
“ thereby limited to *Lovis Carteret* for her Jointure, on any *future*
“ Wife or Wives whom He should marry, after the Death of the
“ said *Lovis Carteret* without Issue.”

And by the same Deed, Sir Robert the Father covenants with Sir
George Carteret, That Sir *Edward Atkyns*, He, and Dame *Mary*
his Wife, would, before the End of *Michaelmas* Term then next,
levy one or more Fine or Fines *sur Conusance de droit*, &c, with
Proclamations, of the Premises contained in this Indenture, unto
the said Sir *Edward Carteret* and *John Lowe*: Which, it was there-
by declared, should be and enure to the several and respective Uses,
upon the Trusts, and to the Intents and Purposes, and with, under
and subject to the Provisoes Declarations and Agreements therein
before declared limited and expressed concerning the same. And
reciting “ that Sir *Clement Farnham* and *Edward Atkyns* were pos-
“ sessed of the Premises in Question, or several Parts thereof, for
“ several Terms of Years then in Being, in Trust for Sir Robert the
“ Father,” It was thereby declared and agreed by Sir Robert the
Father, That Sir *Charles Farnham* and *Edward Atkyns* should stand
possessed of the Premises comprized in the said Terms, during the
Residue thereof, Upon Trust and to the Use and Benefit of the
Person and Persons to whom the Premises (by Virtue of the Limi-
tations therein) should belong.

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* P. 65. * The Jury found that the first of the said Indentures was executed by Sir *Edward Atkyns*, Sir *Robert Atkyns* the Father and Dame *Mary* his Wife, and *John Lowe*; The second of the said Indentures was executed by Sir *Edward Atkyns*, Sir *Robert* the Father, *Phillip Sheppard*, Sir *Clement Farnham*, and *Edward Atkyns* Esq; And the said Indenture of Release, by Sir *Edward Atkyns*, Sir *Robert* the Father, Dame *Mary* his Wife, Sir *Clement Farnham*, *Edward Atkyns* Esq; Sir *George Carteret*, Sir *Philip Carteret*, *Edward Swift*, Sir *Robert Atkyns* the Son, and *Louis Carteret*; and that the Lease for a Year was executed before the Release.

That in *Trinity Term* 1669, a Fine was levied; wherein the said Sir *Edward Carteret* and *John Lowe* were Plaintiffs, and the said Sir *Edward Atkyns* Sir *Robert* the Father and Dame *Mary* his Wife Deforciant, of the Premises in Question, (amongst the said other Lands contained in the greater Deed :) But no Fine was ever levied of the Lands contained in the little Deed only.

Afterwards, on the 6th of *July* 1669, Sir *Robert* the Son was married to the said *Louis Carteret*.

Dame *Mary* (the Wife of Sir *Robert* the Father,) died on 2d *March* 1680.

After which, viz. on 26th *April* 1681, Sir *Robert* the Father, being seised of the Premises in Question, as of Freehold, for the Term of his natural Life, without Impeachment of Waste, (and being then on the Point of marrying a second Wife, Mrs. *Ann Dacres*) duly executed an Indenture under his Hand and Seal, attested by three Witnesses, bearing Date the same 26th of *April* 1681, and made between Himself of the one Part, and Sir *Robert Dacres* Knt. *John Dacres* and *Ann Dacres* Spinster (Sister of Sir *Robert Dacres* and *John Dacres*) of the other Part: By which Indenture, (after reciting the abovementioned Indenture of Release Tripartite of the 12th of *June* 1669, and the Power thereby reserved “ for the said “ Sir *Robert Atkyns* the Father, after the Death of Dame *Mary*, to “ limit all or any Part of the Manor and Premises in Question, to “ any future Wife or Wives He should happen to marry, for the “ Term of the natural Life or Lives of such Wife or Wives only ; “ for her or their Jointure or Jointures,”) it is witnessed that in Consideration of the then intended Marriage between the said Sir *Robert Atkyns* the Father and the said *Ann Dacres* and of her Marriage-Portion, The said Sir *Robert Atkyns* the Father, IN PURSUANCE of the said Power to Him reserved, and of all and every Power and Authority whatsoever, did grant assign limit and appoint the said Manor of *Swell* and other the Premises in Question,
unto

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unto the said ANN DACRES, *for and during the Term of her* * P. 66.
NATURAL LIFE, for her Jointure, and in Bar and Recompence
of her Dower and Thirds at the Common Law.

On 28th *April* 1681, the said Sir Robert Atkyns the Father married the said Ann Dacres.

On 31st *May* 1698, Sir Robert Atkyns the Father, being seised of the Premises in Question, as of Freehold for Life without Impeachment of Waste, executed an Indenture of *Lease*, under his Hand and Seal, attested by 3 Witnesses, dated on the same 31st Day of *May* 1698, and made between Himself of the one Part, and Thomas Dacres Esq; Robert Dacres Gent. and John Dacres Gent. (the 3 Sons of the before named Sir Robert Dacres Knt. and Nephews of Dame Ann Atkyns then Wife of Sir Robert Atkyns the Father) of the other Part. This Indenture of Lease recites the Indenture Tripartite of Release of the 12th of *June* 1669; Whereby Sir Edward Atkyns and Sir Robert Atkyns the Father did (amongst other Lands) grant release and confirm to the said Sir Edward Carteret and John Lowe and their Heirs, the said Manor of *Swell inferior* otherwise *Nether Swell*, with the Appurtenances, and all those Rents of Assize of the Free Tenants of the said Manor extending to One Halfpenny and One Pound of Pepper; and all the Rents of Customary Tenants of the said Manor; and the Capital Messuage and Farm of the *Bold*; and the Park called *Swell Park*, otherwise *Abbot's Wood*; and all and all manner of Tenths or Tithes of the said Park; and the Barcary or Sheep-house called *Gannow*, and the Grounds or Closes of Meadow or Pasture adjoining or belonging thereto; and the Water-Mill called *Bold Mill*, with the Dams, Streams, Waters, Attachment, Fenders, Soak, Suit, Mulcture, Grist and Appurtenances thereunto belonging; All the Tolns of the Customary Tenants of the said Manor, and all and all manner of Tenths and Tithes of all the Premises whatsoever, which unto the late dissolved Monastery of *Hales* did belong; All that Common of Pasture for 400 Sheep and 20 Beasts, upon the Hills and Fields of *Nether Swell*, at all Times in the Year except in the open Time, and in the open Time Common of Pasture within the said Fields for all Manner of Beasts without Number Rate or Stint; and the several Pastures called *Murden Leasows*; all that Barcary or Sheep-house within the said Pasture; all that Pasturage or Feeding for 600 Sheep, or for more or less at the Will and Pleasure of the Tenant of the said Pastures called *Murden Leasows* for the Time Being, in and upon the Demesne Lands Waste Lands and other Lands belonging to the said Farm of the *Bold* or elsewhere, in such ample Manner as the late Abbot of the said dissolved Monastery of *Hales* aforesaid and his Predecessors had kept and occupied the same within the Manor of *Swell* aforesaid; All those Grounds in *Neither*
S *Swell*

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* P. 67. * *Swell* afore said thentofore in the Tenure of *John Winsmore* or his Assigns; All that Half-Acre of Land in *Nether Swell* sometimes in the Tenure of the Curate of the Church of *Stowe* in the said County of *Gloucester*; All that Fishing of the River or Water of the whole Manor of *Nether Swell*, with all Profits and Commodities to the same belonging; All those Portions of Tithes whatsoever, and all and all manner of Tithe of Corn Grain Blade Sheaf Hay Wool Lambs Pasture and other Tenths and Tithes whatsoever in and upon the Premises or any Part of them growing renewing or increasing; (being the Premises in Question;) To the several Uses by the said Indenture limited as afore said: And it also recites the Power to the said Sir *Robert Atkyns* the Father, “ for leasing the Premises, “ as it is set forth in the said Indenture. Then it is witnessed by this Indenture of Lease, That the said Sir *Robert Atkyns* the Father, in Consideration of the *Rent* thereby reserved, IN PURSUANCE of the Power to Him reserved in and by the said recited Indenture, and by Virtue thereof and of ALL AND EVERY Power and Authority whatsoever, did, by that his present Writing indented, under his Hand and Seal, testified by the several Witnesses whose Names are thereupon indorsed, demise lease grant and to Farm let, to the said *Thomas Dacres Robert Dacres* and *John Dacres* and their Assigns, the said Manor, and all and singular the said Lands, Tithes, Tenements, Hereditaments and Premises, with their and every of their Rights Members and Appurtenances, in *Swell inferior* otherwise *Nether Swell*; AND all and every the RENTS RESERVED upon any Leases or Grants; To hold to them the said *Thomas, Robert* and *John Dacres*, from the making thereof, for and during the natural Lives of them the said *Thomas Robert* and *John Dacres* and the Life of the LONGER LIVER of them; YIELDING AND PAYING THEREFORE, during the said Term, unto the said Sir *Robert Atkyns* Party thereto, and after his Decease, to such Person or Persons respectively to whom the said Manor and Premises were limited, according to their respective Estates and Titles, the Yearly Rent of THREE HUNDRED AND THREESCORE Pounds at Michaelmas and Lay-day, by even and equal Portions.

In which said Indenture of Lease is contained a Clause, in these Words; viz. “ The TRUE INTENT AND MEANING of this “ Estate or Term for Lives, so hereby granted and made to the said “ *Thomas Dacres Robert Dacres* and *John Dacres* and the Survivor “ of them, being TO PRESERVE the said Remainder so limited in “ the Premises by the said recited Indenture, to the Right Heirs “ of the said Sir *Robert Atkyns* Party to these presents, AND TO “ SUCH PERSON OR PERSONS TO WHOM the said Sir *Robert* “ *Atkyns* Party to these presents shall ANY WAY DISPOSE OF “ the same, FROM BEING BARRED by any RECOVERY to be suffered, or by any other Act to be attempted or done for the BARRING of the same.”

On

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* On 8th June 1698, *John Dacres*, One of the Lessees in the last * P. 68. abovementioned Indenture of Lease, alone, executed a *Letter of Attorney*, under his Hand and Seal, reciting the said last Indenture of Lease, and empowering and authorizing *Thomas Barker* Gent. as his Attorney, to take *Livery and seisin* of the Premises last above mentioned, from the said *Sir Robert Atkyns* the Father; for HIMSELF (the said *John Dacres*) and FOR the said *Thomas* and *Robert Dacres* and every of them, in THEIR Names and for their Use, according to the Purport and true Meaning of the said recited Indenture of Lease; and to enter and take Possession of the said Manor and Premises in the said Indenture contained, to the Use of THEM AND EVERY of them; He the said *John Dacres* allowing of all and every the Act and Acts so done by the said Attorney, to be as effectual and sufficient in Law, as if He had been personally present and had done the same.

On 5th July 1698, *Sir Robert Atkyns* the Father, being so seised as aforesaid, and then in the actual Possession of the said Manor and Premises, did, in his own Person, deliver Seisin and Possession thereof unto the said *Thomas Barker*, TO THE USE of the said THOMAS ROBERT AND JOHN Dacres and of EVERY of them, and of the Survivor of them, according to the Purport and true Meaning of the said Indenture; He the said *Thomas Barker* being authorized and appointed, by a Letter of Attorney under Hand and Seal of the said *John Dacres*, and by Him duly executed, “ for
“ Him and to his Use and in his Name, AND for the said THOMAS
“ AND ROBERT Dacres and to THEIR Use and in EVERY OF
“ THEIR Names, to take and receive the said Livery and Possession
“ of the said Capital Messuage Manor and Premises, accordingly: ”
As by an Indorsment on the said Letter of Attorney (which is set out in the Verdict) appears.

But the Jury found, that the said *Thomas Dacres* *Robert Dacres* and *John Dacres*, the Lessees named in the last mentioned Indenture, or either of them, NEVER WERE IN POSSESSION of the Premises in Question, otherwise than by the said Livery and Seisin so given by the said *Sir Robert Atkyns* the Father as aforesaid; And that they or either of them did NOT receive or pay any RENT for or in respect of the said Premises; and that the said Indenture of Lease was NOT FOUND IN THE CUSTODY of *Thomas Dacres* the Surviving Lessee, at the Time of his Death.

On 27th May 1708, *Sir Robert Atkyns* the Father, being so seised of the said Premises and of the Remainder and Reversion thereof as aforesaid, made his Will, dated the same 27th Day of May 1708, attested by four Witnesses; And thereby confirmed his Wife's Jointure;

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* P. 69. * ture ; and then recited “ that He was seised of the Remainder and
 “ Reversion in Fee, of the said Manor and other the Premises in
 “ question ; and that such Remainder or Reversion, after the
 “ Death of his Wife, was also further expectant upon an Estate
 “ in special Tail, settled upon his Son Sir *Robert* upon his Marriage,
 “ by the abovementioned Deed of 12th *June* 1669 ; And that He
 “ had made a Lease to the said *Thomas Robert* and *John Dacres*, for
 “ their Lives and the Life of the longer Liver of them, according
 “ to the Power He had reserved to Himself upon the said Settle-
 “ ment :” After which Recital, he disposed of his said Remainder
 or Reversion in Fee, to the Lessor of the Plaintiff, in Tail Male.

The Whole Devise was in the following Words—viz. “ I give
 “ and confirm unto my said Wife Dame *Ann Atkyns*, All those
 “ Lands Tenements and Hereditaments in *Lower Swell* aforesaid,
 “ which were settled upon her for her Jointure, before our Mar-
 “ riage : And I hereby further give and devise to Her, for Term
 “ of her Life, my Manor of *Lower Swell*, and all the Rest of my
 “ Lands Tenements and Hereditaments whatsoever in *Lower Swell*
 “ aforesaid, for Term of her Life, as an Addition to her Jointure.
 “ And whereas I am seised of the Remainder and Reversion in
 “ Fee, of the said Manor of *Lower Swell*, and of the Rest of the
 “ said Lands Tenements and Hereditaments in *Lower Swell*, so
 “ settled, and by this my Will given and confirmed to my said
 “ Wife for her Life ; which Remainder or Reversion, after the
 “ Death of my Wife, is also further expectant upon an Estate in
 “ the said Manor and Lands in Special Tail settled upon my Son Sir
 “ *Robert Atkyns* upon his Marriage, by Deed dated the 12th of
 “ *June* 1669, and upon his Sons by his now Wife and no other
 “ Wife ; And whereas I have made a Lease, dated * the 8th Day of
 “ *June* in the Year of our Lord 1698, executed by Livery and
 “ Seisin, to *Thomas Dacres* Esq; and to *Robert* and *John Dacres*
 “ Gentlemen, for the Lives of the said *Thomas Robert* and *John*
 “ *Dacres* and the Life of the longer Liver of them, according to a
 “ Power I reserved to Myself upon the said Settlement made upon
 “ the Marriage of my said Son Sir *Robert Atkyns* ; Now I give and
 “ devise the said REMAINDER or REVERSION, and the BENEFIT
 “ OF THE TRUSTS of the said Lease for Lives, to my Grandson
 “ *John Tracy*, (the now younger and second Son living of my Son-
 “ in-Law *John Tracy* of *Stanway* in the said County of *Gloucester*
 “ Esq; by my Daughter *Ann Tracy* his Wife,) and to the Heirs
 “ Male of the Body of my said Grandson by him to be begotten.
 “ And if my said Grandson happen to die without Issue Male, then
 “ I give and devise the said Remainder or Reversion, to the next
 “ younger Son of the said *John Tracy* my Son in Law, called *Fer-*
 “ *dinando Tracy*, and to the Heirs Male of the Body of the said
 “ *Ferdinando*. And for Default of such Issue, then I give and de-
 “ vise

* The Testa-
 tor mistakes
 the Date of
 this Lease: It
 was 31st May.
 V. Ante, pa.
 66.

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“ * vife the faid Remainder or Reversion to the next Younger Son * P. 70.

“ my faid Son-in-Law *John Tracy* may happen to have by my faid
“ Daughter, and to the Heirs Male of the Body of fuch next
“ younger Son;” and fo on, to other ftill younger Sons, &c.
(Thefe Devifes were All upon Condition that the faid Sons refpec-
tively fo inheriting the faid Manor and Lands, fhould constantly ufe
to call and write themselves by the Name of *Atkyns* only, for their
Surname, and by no other Surname.) And then the Will pro-
ceeds thus—“ I do further give and devife all my Houfes and all
“ Lands Tenements and Hereditaments fuate lying and being in
“ or near *Curfitor's Alley* in *Holbourn* within the City of *London*
“ or the Suburbs thereof, or within the County of *Middlesex*, or in
“ either of them;” in like manner, and upon the like Condition,
&c. And, reciting that the Reversion or Remainder of his Manor and
Lands in and of *Sapperton* aforefaid, and of the Advowfon of the
Church of *Sapperton*, and of and in his Manor of *Pinbury* and of
the Lands thereto belonging, as alfo of *Pinbury-Park*, was in Him
and his Heirs; and alfo of the 7 Hundreds of *Cirencefter*, and of
the Hundred of *Bisley*, all in the faid County of *Gloucefter*; He
devifed the fame in like manner. The Words of his Will are
thele—“ I having alfo made a Leafe for Lives, of the faid Manors
“ of *Sapperton* and *Pinbury*, and of the faid Advowfon of *Sapper-*
“ *ton*, and of the faid *Pinbury-Park*, and of all the faid feveral
“ Hundreds, the better to preferve and fupport the faid Remainders
“ and Reversions from being cut off or barred by any Recovery.
“ And if my faid younger Grandfons happen to die without Ifsue
“ Male, then I give and devife the fame Reversions and Remainders
“ to my Nephew *Richard Atkyns* (Eldeft Son of my late Brother
“ *Sir Edward Atkyns* deceased) and to his Heirs.”

On 9th *February* 1709, *Sir Robert Atkyns*, the Father, died, feifed
of the Premiffes in Queftion.

Upon his Death, Dame *Ann*, his Widow and Relict, entered
thereupon; claiming the fame for her Life, for her Jointure, under
and by Virtue of the above mentioned Indenture of 26th *April*
1681: And was in *Poffeffion* thereof.

The Jury then find an Indenture Tripartite dated the 18th of
May 1710; made between *Richard Atkyns* Esq; Eldeft Son and
Executor of *Sir Edward Atkyns* (the Surviving Trustee in whom
the Terms for Years mentioned in the greater Deed were vefted,)
on the 1st Part; *Joseph Walker*, Gent. on the 2d Part; and the faid
Sir Robert Atkyns, (the Son) on the 3d Part: By which, after re-
citing the Indenture of Release of 12th *June* 1669, and that it was
therein mentioned, that *Sir Clement Farnham* and *Edward Atkyns*
were poffeffed of feveral Terms for Years in the Premiffes in que-
T ftion,

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* P. 71. stion, and that they were to stand possessed thereof in Trust for such Person and Persons to whose Use and Uses the same were limited by the said Indenture; and reciting that the said Sir Robert Atkyns (the Son) then claimed the said Manor and Premises BY AND UNDER the SAID Indenture; and that Sir Clement Farnham was dead, and the said Edward Atkyns (afterwards Sir Edward Atkyns Knt. Lord Ch. Baron of the Exchequer) survived Him, and was also then dead, having first made his Will and the said Richard Atkyns Executor thereof, and that He had proved the same; The said Richard Atkyns, at the Instance and Request of the said Sir Robert Atkyns (the Son) testified by his executing the said Indenture, and in Consideration of 5 s. paid to Him by the said Joseph Walker, assigned over the said Manor and Premises in Question, to the said Joseph Walker, To hold to Him his Executors Administrators and Assigns; for all the then Residue and Remainder of the said Terms whereof the said Sir Clement Farnham and Edward Atkyns or either of them were possessed; In Trust for the said Sir Robert Atkyns (the Son) and the Heirs Male of his Body by the before-mentioned Dame Lovis his Wife; (the said Premises being so limited in and by the said Indenture of Release of 12th June 1669.) In which said Indenture, there is a Covenant from Sir Robert (the Son) to indemnify the said Richard Atkyns his Heirs Executors and Administrators against any Damages he or they might sustain by reason of his making the said Assignment to the said Joseph Walker as aforesaid.

The Jury further find, That Dame Ann Atkyns being so in Possession of the Premises as aforesaid; In Trinity Term 1710. 9 Ann. an Ejectment was brought in the Court of Common Pleas, for the Recovery of the said Premises, against Her the said Dame Ann and the Tenants in Possession of the same Premises, by John Philips, upon the several Demises of the said Sir Robert Atkyns the Son, and of the said Joseph Walker: In which Ejectment, the Demises were laid upon the 22d Day of May 9 Ann. To hold from the 20th Day of the same May, for 7 Years. And the said Ejectment was tried at the Bar of the Court of Common Pleas, in Michaelmas Term following: And a general Verdict was found for the Plaintiff; and Judgment was entered up thereupon, against Her and the rest of the Defendants therein, for the said John Philips; and he recovered TERMINUM suum predictum, and had an Habere facias Possessionem.

The Jury further find, That upon this Trial, the said two Indentures, called greater and lesser Deeds, of 12th June 1669, were, BOTH of them, read and given in Evidence to the Jury: But that the Deed of Assignment, of 18th May 1710, was NOT produced, nor given in Evidence, to the Jury.

They

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* They find, that soon after the said Judgment in Ejectment, and * P. 72.
during the Life of Dame *Ann*, Sir *Robert Atkyns* (the Son) entered into and was in Possession of the Premises in question, and in the said Declaration in Ejectment mentioned.

They find, that on 1st *January* 1710, *John Philips*, the said Plaintiff in Ejectment, surrendered the two Terms mentioned in the said Declaration in Ejectment to be demised to him by the said Sir *Robert Atkyns* (the Son) and *Joseph Walker*, to the said Sir *R. A.* (the Son) then in Possession of the Premises.

They further find, that on 17th *January* 1710, the said Sir *R. A.* the Son, being so in Possession as aforesaid, and during the Life-time of the said Dame *Anne Atkyns*, Widow, made a Feoffment to *James Earle*, of the Premises in question, in Fee; by Indenture Tripartite of that Date, made between Himself on the 1st Part; *James Earle*, Yeoman, on the 2d Part; and *John Holmden*, Gent. on the 3d Part: which Feoffment in Fee is therein declared to be for the docking, barring and destroying ALL ESTATES TAIL, Use and Uses, Reversions and Remainders, at any Time thentofore made created or limited of and in the Manor and Premises in Question; and for the vesting and settling an Estate in Fee Simple therein, to and in the said Sir *Robert* the Son. Sir *Robert* (the Son) did therefore, in Consideration of 5 s. thereby grant bargain sell enfeoff and confirm unto the said *James Earle* his Heirs and Assigns, the Premises in Question, To hold to and to the Use of the said *James Earle* his Heirs and Assigns for ever; To the Intent and Purpose that the said *James Earle* might become perfect Tenant of the Freehold of the said Premises, in order for the suffering a Common Recovery in Hilary Term then next; wherein the said *John Holmden* was to be Demandant, the said *James Earle* Tenant, and Sir *Robert* Himself Vouchee. Which Recovery, it was thereby declared, was to be and enure to the Use and Behoof of the said SIR ROBERT ATKYNS (the Son) his Heirs and Assigns for ever; and to or for no other Use Intent or Purpose whatsoever. And by this same Deed, Sir *Robert Atkyns* (the Son) constituted *Edward Carter* and *John Langford* his Attornies and Attorney, either jointly or severally to enter upon and take Seisin and Possession of the Premises, and to give and deliver Seisin and Possession thereof to the said *James Earle* and his Heirs and Assigns for ever, according to the Purport and true Meaning and for the Purposes in the said Deed mentioned.

And the Jury find, that on 20th *January* 1710, *Edward Carter*, One of the said Attornies, entered upon the Premises, and gave Seisin and Possession thereof to the said *James Earle*, by Virtue of the said Warrant of Attorney contained in the said Indenture: As
2 appears

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* P. 73. * appears by a Memorandum indorsed upon the said Indenture, and found by the Verdict.

They find that in *Hilary Term 9th Ann.* (1710) a Recovery was suffered of the Premises; wherein *John Holmden* was Demandant; *James Earle*, Tenant; and *Sir Robert Atkyns* (the Son) and *Louis* his Wife, Vouches; And Seisin executed thereon: Which Recovery they find to be prosecuted had and executed to the several Uses mentioned in the said Deed of Feoffment. And they find, that after this Recovery, *Sir Robert* the Son continued in Possession of the Premises till the 9th of *November 1711*.

They find the Death of the said *Sir R. A.* (the Son) on 9th *November 1711*, without Issue Male by the said *Louis* his Wife, who survived Him.

They also find, that an Ejectment was brought for the Premises, against *Robert Atkyns Esq;* and his Tenants of the Premises in Question, in *Hilary Term 1711, 10 Ann.* by *John Miles*, as Plaintiff, on the several Demises (both laid to be made on 14th *February 8 Ann.* 1709. which is 5 Days after *Sir R. A.* the Elder's Death) of *Dame Ann Atkyns* the Jointress, and of *Thomas Dacres*, the surviving Lessee under the Indenture of Lease of 31 *May 1698*. And in *Easter Term 1712, 11 Ann.* a general Verdict was given for the Plaintiff, on both Demises, on a Trial at Bar in this Court: and Judgment was entered up accordingly, "that the Plaintiff do recover his several Terms aforesaid." And the said *Dame Ann Atkyns* entered upon the Premises in question, immediately after this last Judgment; and continued in Possession thereof till 9th *October 1712*: When She died.

Soon after the Death of *Dame Ann*, the (original) Defendant *Robert Atkyns Esq;* Nephew and Heir Male to *Sir R. A.* the Son (and also Heir at Law to *Sir R. A.* the Father) entered upon the Premises, and continued in Possession thereof till his Death; which happened on 16th *March 1753*. [*Robert's* Death was just 3 Months after the now Lessor of the Plaintiff's actual Entry: And it was after Issue joined in this present Ejectment.]

John Dacres, one of the Lessees in the Indenture of Lease dated 31 *May 1698*, died in 1705.

Robert Dacres, another of them, died in 1706.

Thomas Dacres, the third of them, survived the other Two; and died on 23d *July 1752*.

They

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* They find that *John Atkyns*, the *Lessor of the Plaintiff*, NEVER * P. 74.
WAS IN POSSESSION of the Premises in question or any Part thereof, nor in Receipt of the Rents and Profits thereof or of any Part thereof; NOR ENTERED thereupon, TILL the 15th of December 1752; When He made an ACTUAL ENTRY into and upon the same; claiming the same as *Devisee* thereof under and by Virtue of the Will of the said *Sir Robert Atkyns* the Father; and ejected, drove out, and removed the said *Robert Atkyns Esq; Charles Coxe, Thomas Horde, &c*, therefrom; and was *seised thereof, as the Law requires*; and being so *seised* thereof, made the Demise to the said *Cyprian Taylor* the now Plaintiff, on the 16th of December 1752, to hold from thence for 15 Years, By Virtue whereof, the said *Cyprian Taylor* entered on the 18th, and was ejected by the Defendants on the 19th.

And then they conclude generally, as usual; submitting the Matters of Law to the Judgment of the Court, upon the above Facts.

This Case was argued four several Times; First, on *Tuesday 3d June 1755*, by *Mr. Yorke*, for the Plaintiff, and *Mr. Knowler* for the Defendants; Again, on *Tuesday 11th November 1755*, by *Mr. Pratt* for the Plaintiff, and *Mr. Perrott* for the Defendants; a 3d Time, on *Tuesday 11th May 1756*, by *Mr. Caldecot* for the Plaintiff, and *Mr. Serjeant Prime* for the Defendants; and a 4th Time, on *Friday 19th November 1756*, by *Mr. Caldecot* for the Plaintiff, and *Mr. Knowler* for the Defendants: But it is unnecessary to repeat the three first Arguments particularly; Because the last includes the general Substance of them.

The Sum of what was urged on the Part of the Plaintiff was, That the Leasing and Jointuring Powers *existed* at the Time when they were executed by *Sir Robert Atkyns* the Father; That those Powers were *well executed* by Him; That the Lease and Jointure made by him, in Pursuance of those Powers, were an *Impediment* to his Son *Sir Robert* the younger's Suffering a Common Recovery; That even supposing that *James Earle* was a good Tenant to the *Præcipe*, Yet the *Entry of Dame Ann* the Jointress, within the 5 Years, *avoided* this Recovery; and consequently, that the Remainder or Reversion in Fee, devised to the lessor of the Plaintiff by *Sir Robert* the Father, was *Not barred* by the Recovery thus suffered by *Sir Robert* the Son.

These Points were entered into very largely, by *Mr. Caldecot* and the Gentlemen who had spoken before Him, on the same Side.

They, first endeavoured to prove that the Powers reserved to *Sir R. A.* the Father by the Two Deeds of 12th June 1669 were in
U being

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* P. 75. * *being* and *valid* at the Time of the Execution of the Lease to the *Dacres*; and secondly, that they were *well executed*; and consequently, that there were Estates of Freehold subsisting at the Time when Sir R. A. the Son made the Feoffment to *Earle*; viz. Dame *Ann's* Jointure, and the Lease to the *Dacres*: And therefore, thirdly, They insisted that these Life-Estates were Impediments to Sir R. A. the Son's Suffering the Common Recovery. They denied that Sir *Robert Atkyns* the Son was Tenant in Tail in Possession, at the Time that he made the Feoffment to *James Earle*: So that *Earle* could not be a good Tenant to the *Præcipe*. And they urged, that even admitting that Sir R. A. the Son was Tenant in Tail in Possession, Yet He could not upon this *naked* Possession, without the Freehold, make a good Tenant to the *Præcipe* without the Jointress and the *Lessee for Life's* joining: And that the Court cannot, (under 14 G. 2. c. 20. § 1.) PRESUME a *previous Surrender or Conveyance* of the Estates for Life, in order to make the Recovery good.

They further, fourthly, insisted, that supposing Sir *Robert Atkyns*, the Son, was Tenant in Tail in Possession, and also that there was a good Tenant to the *Præcipe*; (so that the Recovery was good, as a Common Conveyance;) Yet the *Re-Entry* of Dame *Ann Atkyns*, the Jointress, within the 5 Years (in 1712) actually avoided this Recovery; which, if not void, was at least *voidable* by the Tenant for Life: And this *Re-Entry* of the Tenant for Life re-vested all the subsequent Estates.

The great Stress of the Question lies (as they said) upon the *Tenant to the Præcipe*.

1st Point.

The 1st Point, in Order of Time, is the *Validity of the two Powers* created by the greater Deed of 1669.

But there is no Ground, either for the Supposition of a *Fact*, "That the lesser Deed must have been executed *last*;" or for any *Inference* in Point of Law, "That it operates to the *Extinction* of these Powers."

The *Fact* concerning the Priority of Execution of the two Deeds cannot, now, be determined by any Evidence: Therefore *Presumption* must determine it.

Now one of these Deeds is an Agreement to execute the other: Consequently, must have been prior to it. The lesser Deed *covenants*; The greater *performs* that Covenant: Therefore the lesser was prior. If it had been executed *last*; that would have destroyed the

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* the very Effect of it and the Powers raised by it. Dame *Mary* was * P. 76. giving up and exchanging her former Jointure: And therefore *She* might desire a single distinct Deed, to secure her own Interest. For which Purpose, a Deed of Covenant was the most proper: And there was no Need to incumber this Lesser Deed, with the Powers inserted in the Greater Deed; which Powers did not concern *Her*. Whereas, in order to support a contrary Argument, it is necessary to suppose a *new* Agreement (without, and even against, any Reason for it,) to alter and destroy the former Agreement. But if the Parties had *meant* so, they would have so *expressed* it.

However, supposing the lesser Deed to have been *actually* executed *last*; Yet being all *Uno Flatu*, the *Law* will order the Time, so that the proper Deed shall be *taken* to be anterior, and the other subsequent, *according to the Reason of the Thing* and the *Intent of the Parties*. *Digges's Case*, 1 Co. Rep. 173. *Albany's Case*, 1 Co. Rep. 107. and 2 Rep. 75. the Lord *Cromwell's Case*.

And the operation of the *Fine* will follow the *Construction of the Deed*.

Countess of *Rutland's Case*, 5 Co. 26. a.

Therefore, the Existence of the Powers being established, The ^{2d Point.} next Question is, "Whether they have been *WELL executed*." Dame *Mary's Jointure* has *not* been objected to: But the Lease made to the *Dacres* has; (1st) As being *without a subsisting Power* in Sir *R. A.* the Elder, the Lessor, to make it; (2dly) As being *FRAUDULENT*, even supposing Him to have had Power to make it; (3dly) As the Livery and Seisin was made to the Attorney of *ONE* only of the three Lessees, and not to *All 3*, or their Joint-Attorney.

Now it is true, that a Tenant in Tail *in Possession* may suffer a Recovery: So also may a Tenant in Tail in *Remainder*, if he can get *in the Tenant for Life*.

But the Original Donor may interpose as many Estates for Life, as he pleases, before and prior to the Tenancy in Tail. And this Lease to the *Dacres*, under the Power, is just *the same* as if it had been *ORIGINALLY interposed*. And the *Declaration of the Intention* will *NOT vitiate the Estate* limited to these *Dacres*: If it had been even a *Condition* annexed, in Restraint of Alienation, such a Condition would have only been void; and the *Estate*, good. *Co. Litt.* 24. a. *Corbet's Case*, 1 Co. 84. *Mary Portington's Case*, 10 Co. 35. b.

As

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* P. 77. * As to Fraud—There is Nothing fraudulent in this Lease. And both the Terms have been actually recovered at Law.

If Sir R. A. the Father's superfluous Declaration has any Effect, it makes the Lease Good: And it would have been adjudged good, if it had been called in question whilst it subsisted. 2 Leon. 132. *Moore and Savill's Case*.

And No One is hurt or defrauded by this Lease. *Not the Jointress*: For, the full and best Rent is reserved. Therefore *Cro. Eliz.* 5. *The Countess of Sussex's Case* does not affect *this Case*: For there, the Jointress suffered. Nor is the *Tenant in Tail* hurt; for the same Reason, as to his *Rent*: And as to the *postponing* his Power to suffer a Recovery, it was legal, and might have been done by a real actual Demise for Life or Lives. And the Eyes of this Court do not pierce further than the *Shell* of the Conveyance; Not to the *Design* of it. As in Cases of Terms to preserve contingent Remainders, This Court cannot hinder the Trustee from destroying them: So, of Terms to attend Inheritances; Which this Court cannot hinder the Mortgagee from getting in. *Cro. Car.* 190. *The Case of Nash v. Preston*, is a strong Case to shew that the Court of Law will not meddle with the *Equity* of the Case.

Now this Lease has *pursued the Power*: And this Court will not meddle with the *Intent*.

Leases made by Churchmen, for the Benefit of their Families, are generally as fictitious as this: And yet they are always allowed to be good.

As to the Livery and Seisin—This Livery to *Thomas Barker* ensured to the Use of all the *three Dacres*, according to the Purport and true Meaning of the Letter of Attorney, most explicitly therein expressed, and so declared at the Time of the Livery, by Sir R. A. the Elder who gave it.

This sufficiently appears (as the present Infeoffment was by DEED,) from *Bro. Abr.* Title *Feffements de terres*, pl. 16, 67, 72. and *Co. Litt.* 48. b. 49: a. But 2 *Anderf.* 196. pl. 14. *The Case of Davy v. Abbot*, is in Point: 'Tis most exactly the same Case as this.

So that the *Life-Estates* of Dame *Ann* and of the 3 *Dacres* appear to have been *well created*.

Consequently therefore, a *double Freehold* is sufficiently established; *viz.* One, in Dame *Ann*; the Other, in the *Dacres*.

From

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* From hence it follows, Thirdly, That Sir Robert Atkyns the Son, * P. 78.
was by them precluded from suffering this Recovery: As he was
not Tenant in Tail in Possession, at the Time of his making the 3d Point.
Feoffment to James Earle. Therefore He was to gain a Freehold
as he could; by Right, or Wrong: And it may be said, that Either
of them will do.

But even supposing Him to have been Tenant in Tail in Possession,
Yet James Earle was no good Tenant to the Præcipe.

When he recovered against Dame Ann, He was not Tenant in
Tail in Possession: But he recovered against Her, upon a Supposition
“ that he was.” Which Supposition was grounded therefore
upon a Mistake. And the Terms which Philips recovered as his
Lessee, and surrendered to Him, were Both of them fictitious. So
that the Feoffment to Earle must fall to the Ground; having no
Foundation to support it. And though Livery was given to Him
by Sir Robert, yet Sir Robert Himself CONTINUED in Possession till
his Death.

Which Observations being premised, this Part of the Case may
be considered, 1st on Sir Robert's Verdict and Judgment against Dame
Ann; and 2dly on his subsequent Feoffment to Earle.

First—His Entry under the Judgment cannot amount to a Dis-
seisin; Nor had He thereby, an Estate pursuant to his Title, as
there claimed by Him; It could not be more than an Estate in Tail,
EXPECTANT upon two Freeholds. It could not be a Disseisin:
Because it was an Entry UNDER a Verdict. In Truth, He gained
only a bare naked Possession, without the Freehold. And so is the
Writ of Habere facias Possessionem: And the Judgment is “ to re-
cover the Term” only. And Cro. Eliz. 438. the Case of Bateman
v. Allen, (upon a Devise the same with that in the Case of Newys
and Scholastica his Wife, v. Larke, in Plowd. 403.) also proves this.

Therefore the Entry under the Judgment in Ejectment could give
no Title to Sir R. A. the Son, to suffer a Recovery: It was a
LAWFUL ENTRY; but an UNLAWFUL HOLDING. Co. Lit. 57.
b. A wrongful Withholding is not a Disseisin; but a Deformation.
Co. Litt. 277. b. 331. b. 354. b. 355, 356. And this is without
the Freehold.

'Tis like the Cases of Tenant at Sufferance: 12 Affise 22. Co.
Lit. 57. b. 1 Ro. Abr. 659. Title Disseisin, Letter C. pl. 10, 11.
Cro. Jac. 169. The Case of Butler v. Duckmanton. Co. Lit. 270,
271. Cro. Eliz. 238. The Case of Allen v. Hill. All which Cases
X concur

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* P. 79. * concur to prove "That Nothing shall operate by way of Disseisin, but a TORTIOUS ENTRY."

And there is NO MIDDLE *kind of Holding*, between a *naked Possession*, that disturbs nothing; and a *Fee*, which disturbs every Thing.

Then, secondly, as to the Feoffment to *James Earle*. It gained no Estate to *Earle*. This is a very great Point to Families, for the Preservation of Intails.

If the contrary Construction should prevail, even Tenants *at Will* might do the same thing.

But the Line is drawn thus, *viz.* "That a Tenant in Tail, "WITH the Freehold, may bar: But *without* it, He can NOT."

A *Real* Feoffment indeed *may* do it: But a *fictitious* One can not; but shall be considered as fraudulent and void, like that in *Savile* 126. *Leon. White v. William Bacon*. It is not a Discontinuance: *Swift v. Heath, Carthew* 109, 110.

Sir R. A. the Son, gained no Fee by it, to himself; nor any to *Earle*: And the Court will consider it as merely *collusive*.

That He gained None, *to himself*, appears from 1 *Brownlow* 230. *Dame Pett's Case*. 2 *Inst.* 412, 413. *Cro. Car.* 302. *Blunden v. Baugh. Braclon Lib.* 4. *pa.* 161, 162. *Co. Lit.* 153. *Dy.* 62. 11 *Affize* 6. *Powsley v. Blackman, Cro. Jac.* 659. *Bull v. Wyat, Cro. Car.* 388.

That He gained None *to Earle*, is equally true. *Earle* gained no Estate of Freehold, by this Feoffment; either as a Wrong-Doer, or as a Disseisor. 1 *Ventr.* 360. Serjeant *Maynard's* Argument in *Moore v. Pitt*.

He might indeed be taken as a Disseisor, *at the Election* of the right Owner; but *not* against it. And here was *no Intention* of a Disseisin. *Cro. Jac.* 643. *Ferrers v. Farmer.* 1 *Mod.* 107. *Fountain v. Cooke.* In Fact, here was NO *Actual Disseisin*: For Sir R. A. the Son *continued* in Possession. Neither was here any Force or Expulsion. And it is *not every* Entry, that is a Disseisin: 'Tis no Disseisin, unless there be an Expulsion. *Co. Lit.* 181. 1 *Salk.* 246. *pl.* 2. most expressly.

Considering this Feoffment AS *part* of the CONVEYANCE of a *Common Recovery*, as a *Common Assurance*, Sir Robert the Younger had no Power to make a Feoffment.

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* It is not hereby meant that he could not *in Fact* make a Feoff- * P. 80.
ment: Every Man in Possession may do it. But this Sir R. A. the
Son, could not convey an Estate of Freehold, by any *rightful* Con-
veyance, as Fine, Release, or Bargain and Sale. And if He cannot
do it by a *rightful* Method, will the Law permit him to do it by a
wrongful One? Surely not. The Possession of a Tenant at *suffe-*
rance is not sufficient to build a Title upon. *Co. Litt.* 278. *Cro.*
Jac. 169. *Cro. Eliz.* 238.

Common Recoveries are now considered as a *mere Conveyance* :
And the Recoveror is a *mere Instrument and Creature* of the Tenant
in Tail. 2 *Rep.* 77. *Cromwell's Case.* *Poph.* 23. *The Case of Crocker*
and York v. Dormer. *Cro. Jac.* 643. *Sir John Ferrers and Sir John*
Curson v. Sir Richard Fermor and others. 2 *Ro. Rep.* 247. S. C. (at
the End of it.) 1 *Mod.* 107. *Fountain v. Coke.* So, the known
Case of Copyholds, 4 *Co.* 28. *a. Coke's Compleat Copyholder* ; And
the Case in 1 *Ro. Rep.* 223. *Herbert v. Binion.*

From all which Cases it is clearly to be inferred, That the whole
Transaction is *One Common Assurance* ; that the Recoveror is a *Crea-*
ture and *Instrument* of the Tenant in Tail ; and that it shall not be
considered as a *tortious Entry* and a *Disseisin*, in a *Common Assurance*.

Such a Feoffment as this, may be made by *any Person in Posses-*
sion : And, if this should be established, it may be of very mis-
chievous Consequence ; and will introduce a *new Law*, contrary to
all *former Rules and Doctrines*.

The *Stat.* 14 *G.* 2. *c.* 20. considers a Common Recovery as a
Common Assurance ; and has a Proviso, " That the Person *had a*
Title to make a Tenant to the Præcipe." And here is not the least
Ground to presume that the Tenants for Life either Joined or sur-
rendered their Estates.

Now if the Law considers that some Persons *have* this Power,
and others *have not* ; the Law will never suffer that to be done by
Fraud, which can *not* be done *fairly and regularly*. And this
whole Transaction is *fraudulent and collusive*, and done *eo animo* to
bar the subsequent Estates ; and is therefore VOID, *as a FRAUD*,
within the Rule and Reason of *Fermor's Case.* 3 *Co.* 77. *b.* which
considers an Estate made by Collusion and Fraud, as *no Estate*.

Lastly.—Admitting the Facts of Sir R. A. the Son's being Te- 4th Point.
nant in Tail in Possession ; and also, that there was a good Tenant
to the *Præcipe* ; Yet THE RE-ENTRY of the *Jointress* actually
avoided it, and *revested* all the subsequent Estates.

If,

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* P. 81. * If the Recovery was not absolutely void, but good as a COMMON Conveyance, yet it was VOIDABLE: And if it was voidable, then it was *actually* AVOIDED by the Entry of Dame Ann, upon Demises laid as far back as the 14th of February 1709.

To prove this, they applied the Cases in 11 Co. 51. *b. Lifford's Case*; Cro. Eliz. 540. *Holcomb v. Rawlyns*; 1 Anderson 352. *Butler v. Baker*; Fitz-Gibbon 225. *Bunker v. Cooke*; Holt's Cases 748; 1 Co. 14. *b. Sir William Pelham's Case*; and a Case in C. B. in H. 12 Ann. *Goodtitle v. Ridsen*.

It is like the *Regress of a Disseisee*, Which avoids all intermediate Acts, by *Relation*.

Argument ex parte Def'. Mr. Knowler, who twice argued this Case for the Defendants, included in his last Argument all that had been or could be urged on that Side of the Question: And it was to the following Effect.

The main Question upon this Case is, "Whether the Recovery suffered by Sir R. A. the Son, be a GOOD Recovery.

For 'tis insisted by the Lessor of the Plaintiff, "That the Recovery is void, as being suffered by a Person who had *only* a BARE Possession, and had *no Power* to make a Tenant to the *Præcipe*."

But if the Recovery is good, the Lessor of the Plaintiff can have no Title: Because *he* claims under a Limitation in Fee, expectant on the Determination of an Estate Tail, which is *barred* by the Recovery.

The Limitations, under which All the Parties derive their Title, are contained in two Deeds, dated 12th June 1669: Which, from their Bulk, and for Distinction's Sake, have been called the *great Deed* and the *little Deed*.

The *great Deed* is a Release, grounded on a Bargain and Sale for a Year: The *little Deed* is a Covenant to levy a Fine, and a Declaration of the Uses of the Fine.

In speaking to the Question,

Four Matters must be taken into Consideration, *viz.*

First, The Order in which the two Deeds were executed; and in what manner they influence each other. And from this Consideration

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* fideration it will appear, Whether the Leasing and Jointuring * P. 82.
Powers did EXIST at the Time when they were exercised by Sir
Robert Atkyns the Father.

Secondly, Supposing the Leasing and Jointuring Powers did then
exist, Then whether those Powers were WELL EXECUTED by the
said Sir *Robert* the Father.

Thirdly, Supposing they were well executed, Then Whether the
Lease or the *Jointure*, made pursuant to these Powers, were AN
IMPEDIMENT to Sir *Robert Atkyns* the SON's suffering the RECO-
VERY.

Fourthly, If the Recovery was good, Then Whether the RE-
ENTRY of *Dame Ann*, under the second Ejectment, did AVOID it.

First, As to the *Order* in which the two Deeds were executed; 1st Point.
and in what Manner they influence each other.

It is found by the Verdict, That Sir *R. A.* the Father, being
seised of the Estate in question and of several other Estates, on
12 June 1669, made and executed 3 Indentures. By the first, He,
in Consideration of a Marriage before that Time had with *Dame*
Mary his then Wife, and of her releasing a former Jointure made
to her before their Marriage, covenanted that He and the said *Dame*
Mary his Wife and Sir *Edward Atkyns* (his Father) would levy a
Fine to *Edward Carteret* and *John Lowe*, of the Estate in question
only; To the Use of Sir *R. A.* the Father for Life, *sans* Waste;
Remainder to the said *Dame Mary*, for Life, for her Jointure;
Remainder to Sir *R. A.* the Son and the Heirs Male of his Body
by *Lovis Carteret* his intended Wife; Remainder to the Right Heirs
of Sir *Robert* the Father.

By the 2d Indenture (taken in the Order as they stand in the
Verdict) The Estate in question is bargained and sold by Sir *Edward*
A. and Sir *R. A.* the Father, to Sir *Edward Carteret* and *John*
Lowe, for a Year.

By the 3d Indenture, Sir *Edward A.* and Sir *Robert A.* the
Father, in Consideration of a Marriage before that Time had be-
tween Sir *R. A.* the Father and *Dame Mary* his then Wife, and of
a Marriage to be had between Sir *R. A.* the Son and *Lovis Carteret*,
and of her Marriage Portion, and for a Provision to be made for
Dame Mary, of a Jointure, release the Estate in question (*inter*
alia to *Carteret* and *Lowe* and their Heirs, To the Use of Sir *R. A.*
the Father for Life, *sans* Waste; Remainder (except Timber) to
Dame Mary for Life, for her Jointure; Remainder to Sir *R. A.* the
Y Son

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- * P. 83. * Son and the Heirs Male of his Body on the Body of *Louis Carteret*; Remainder to the right Heirs of Sir *R. A.* the Father. (These are all the Limitations in this Indenture, concerning the Estate in question.) Sir *R. A.* the Father covenanted with Sir *George Carteret* (the Father of *Louis C.*) That for the better securing the Estate in question to Sir *Edward C.* and *John Lowe* and their Heirs, He and Dame *Mary* his Wife and Sir *Edward Atkyns* would levy a Fine to *Carteret* and *Lowe* and their Heirs, to the Uses before declared.

In *Trinity Term* 1669, a Fine with Proclamations was levied, of the Estate in question (together with other Estates) by Sir *Edward A.* Sir *R. A.* the Father, and Dame *Mary* his then Wife, to Sir *Edward Carteret* and *John Lowe*.

It is NOT found, *which* of the two Deeds was executed *first*; (though it was a Matter of *Fact*;) So that the Priority of Execution must be determined by the Court, from *Circumstances* and *Presumptions*.

The Order in which the Two Deeds stand in the *Verdict*, concludes Nothing, One way or the other: Since they are placed there, *as* they were given in Evidence.

Then He proceeded to compare the two Deeds, and to reason upon them; and argued very elaborately, That *either* the *little Deed* was executed AFTER the *great Deed*; Or that the *little Deed* was made with a *View to control or correct the great Deed*; Or that the *great Deed*, and the *little Deed*, and the *Fine* must be considered as *One ASSURANCE*, (though *not* as incorporated, and as one single *Act*;) And in either Case, there is an *End* of the *Leasing Power*, and also of the *Jointuring Power*.

And He argued very strenuously, That the *Fine* would *extinguish* both those Powers; because they were Powers *appendant* and *annexed* to Sir *R. A.* the Father's Estate for Life, and NOT *collateral* to his Estate.

2d Point. Second Point or Head—Supposing the *great Deed* was *last* executed, Or that it *controls* or *corrects* the *little Deed*, Then

Whether the *Leasing* and *Jointuring Powers* were well EXECUTED by Sir *R. A.* the Father.

He chose to say nothing as to the Execution of the *Jointuring Power*; No Circumstances attending the Execution of *it*, having been laid before the Jury: But confined Himself to the *other*, (the * *Leasing Power*)

* See the Note at the End of the Reply, pa.

104, 105, accounting for curtailing this Part of the Argument.

Now

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* Now this Lease is void, as against Law ; being made for no other * P. 84.
Purpose than to restrain Sir R. A. the Son from suffering a Recovery.
For that Restraint is against Law.

The Power to suffer a Common Recovery, is a Privilege inseparably incident to an Estate Tail: It is a *Potestas alienandi*, which is not restrained by the Statute *de Donis*; and has been so considered ever since *Taltaram's Case*. [12 E. 4. 14. b. pl. 16.] And this Power "to suffer a Common Recovery" cannot be restrained by Condition, Limitation, Custom, Recognizance, Statute, or Covenant.

That it cannot be restrained by Condition, appears by *Co. Litt.* 223. b. 224. a. and *Sonday's Case*, 9 Rep. 128.

That it cannot be restrained by Limitation, appears by *Cro. Jac.* 696. *Foy v. Hinde*; and by *Sonday's Case*, and other Books.

That it cannot be restrained by Custom, appears by the Case of *Taylor and Shaw*, in *Carter* 6 E. 22.

That it cannot be restrained by Recognizance, or by Statute, appears by *Poole's Case* cited in *Moore* 810.

That it cannot be restrained by Covenant, appears by the Case of *Collins v. Plummer*, 1 Peere Wms. 104.

That an ATTEMPT to suffer a Common Recovery cannot be restrained, appears by *Corbet's Case*, in the 1 Rep. 83. *Mildmay's Case*, in the 6 Rep. 40. and the Case of *Pierce v. Win*, in 1 Ventr. 321.

And that a CONCLUSION to suffer a Recovery cannot be restrained, appears by *Mary Portington's Case*, in the 10 Rep. 35.

So that the Question is reduced to this, "Whether *that* can be effected by a LEASE made pursuant to a Power, which can not be attained by a Condition, Limitation, Custom, Statute, Recognizance, or Covenant."

Since the Law has been thus careful to preserve this incidental Privilege of suffering a Common Recovery, to a Tenant in Tail, Surely it will not permit this new Experiment, equally destructive to that Privilege, to take Place. This is the first Attempt of the Kind: And it is a sound Rule of Law, "That what never has been, ought not to be permitted."

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* P. 85. * The LEASE is also *void*, as being *fraudulent*: For it was made, to deprive Sir R. A. the Son, of the Profits of the Estate, and of an incidental Power over it. And the Fraud which made it void, was *apparent*. And as the Estates affected by the Lease, subsisted before the Lease was made, the Lease was *fraudulent at Common Law*.

To prove the Lease to be fraudulent, He relied on *Savile* 126. *The Case of White v. Bacon*, H. 32 Eliz. In a *Formedon*, the Tenant pleaded Non-tenure: On which, the Parties were at Issue. The Jury found "That the Tenant made a Feoffment to several Persons, to their own proper Use, before the Writ purchased; and " that the Feoffees *never took the Profits* of the Land; but that the " Feoffor took them, untill the Day of purchasing the Writ." And the Doubt was, Whether the Feoffment was fraudulent as against the Demandant. And the Judgment of the Court was, " That it " *was fraudulent and void*." Now if the Feoffee's *not taking the Profits*, but the FEOFFOR'S *taking them*, was a Reason for adjudging the Feoffment to be fraudulent against the Demandant in *that Case*; The Lessee's *not taking the Profits, not paying the reserved Rent, nor having the Lease in his Custody*; but the LESSOR'S CONTINUING in Possession and taking the Profits to the Day of his Death, seem in the *present Case*, to be full as cogent Reasons for determining this Lease to the *Dacres* to be fraudulent, against Dame Ann and Sir R. A. the Son.

If this Case should be answered by saying " The Feoffment " therein mentioned was made void by 13 Eliz. c. 5. made against " fraudulent Grants;" The Reply would be " That that Statute " was made in Affirmance of the Common Law;" as appears by *Twine's Case* in the 3 Rep. 82. b. But He argued that the Lease was fraudulent not only at *Common Law*, but likewise by the Statute. For the Marriage of Dame Mary with Sir R. A. the Father, and Dame Mary's Releasing her former Jointure, were a *valuable Consideration* for the Estate limited to Dame Mary for Life: And the Marriage-Portion of *Louis Carteret* was a *valuable Consideration*, which extended to the Limitation to Sir R. A. the Son and the Heirs Male of his Body by *Louis Carteret*.

Here it hath been observed, " That if the Lease had been called in question *whilst it subsisted*, it could *not* have been avoided; but *would have been adjudged absolute*, for the Benefit of the Lessees:" And 2 Leon. 132. *Moore and Savill*, and other Books, were cited as Authorities to support the Observation.

Answer—The Objection to the Lease is, " That it NEVER " DID *subsist*," for the Reasons which have been mentioned: And if

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* if the Lease was *void* from the Beginning, 'tis a *Contradiction*, to * P. 86. say "it shall be adjudged absolute." And the Authorities cited are, All, of Conditions subsequent to the Estate created at the same Time with the Condition. In which Cases, there was no Objection to the Estate; (for the Estate was allowed to be well created:) But the Objections were to the Conditions, which were *subsequent* to the Estate.

It has been observed farther, "That the Eyes of the Court do not pierce further than the Shell of a Conveyance; *not* to the *Design* of the Maker of it." Here indeed One must be at a Loss for an Answer; for want of knowing what the *Shell* of a Conveyance is. But there is one Thing that appears upon this special Verdict, which very much favours, if it does not directly establish what We have been contending for: And that is the *Verdict* which is found to have been *obtained* BY Sir R. A. the Son, against Dame Ann the Second Wife of Sir R. A. the Father; which Verdict is a *Disaffirmance* of the *Leasing* and *Jointuring* Powers; and *could not have been obtained*, if those Powers *had subsisted*. 'Tis true, there is a Deed found also in the special Verdict, which was made between the Death Sir R. A. the Father and the bringing the Ejectment, and to which Sir R. A. the Son is a Party; In * which Deed there is a *Recital* "That Sir R. A. The Son then claimed the Estate in * The Indenture Tripartite dated 18 May 1710. V. pa. 70. "question, BY and UNDER the GREAT Deed:" Which Deed was not given in Evidence on the Trial of the Ejectment. But this Finding is a Matter of no Moment: For the little Deed was executed either before, or at the Time, or else subsequent to the Time of executing the great Deed. If it was executed *subsequent* to the Execution of the great Deed, then the little Deed and Fine control the great Deed, by *extinguishing* the Powers. If it was executed *before* or *at* the Time of executing the great Deed, then the two Deeds and the Fine may be taken as *One Assurance*; (*V. Ante* 83.) And in that Case, the little Deed *corrects* the great One, by limiting the Estate in question, to Sir R. A. the Father, *discharged* of the Powers. And in *either* Case it may be said, with great Truth, "That Sir R. A. the Son *claimed under the GREAT Deed*." However, supposing the Person who drew the Deed, had mistaken the Law, and made a *false Recital*, surely a *Mis-Recital* of Matter of Law will not conclude a Court of Justice. And what Sir R. A. the Son's *own* Opinion upon the Matter was, will appear by the recent Pursuit of his Title against Dame Ann; for Sir R. A. the Father died in February 1709: And in Trinity Term following Sir R. A. the Son brought his Ejectment against Dame Ann, who was then in Possession of the Estate under the Jointuring Power.

But it having been found, "That afterwards Dame Ann brought an Ejectment, and recovered the Estate, upon two Demises, one
Z " made

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* P. 87. “made by Herself and the other by the surviving Lessee for Life;” It hath been insisted that Dame *Ann* COULD NOT have obtained that Verdict, UNLESS the *Two Powers*, or One of them at least, had then existed.

To which it may be answered, That it does not appear that the *little Deed* was PRODUCED in Evidence, upon the Trial of that Ejectment. Or perhaps the *Jointuring Power only* might then be in Question: Or there might have been *other Reasons* for the Difference in Opinion. But however it might happen, still That Verdict is *not conclusive*.

Here, Mr. *Knowler* argued that the Lease to the *Dacres* must have determined in 1711, upon the Death of Sir *R. A.* the Son, without Issue Male: And that the Lessor of the Plaintiff was *barred of his Remedy* by this Action of Ejectment, (being an Action grounded on an Entry;) because it was not brought within 20 Years after his Title accrued; and consequently, his *Entry was not lawful*, by 21 Jac. 1. c. 16.

But these Parts of his Argument are omitted, for the Reason given in the Note *pa.* 104, 105.

Third Point or Head.—But supposing the leasing and the Jointuring Powers *did exist*, and *were well executed* by Sir *R. A.* the Father; The Matter which falls next under Consideration is, “Whether the Lease or Jointure made in Execution of the Powers, were an IMPEDIMENT to Sir *R. A.* the Son’s *Suffering the Recovery*.”

The Point we shall endeavour to establish, is That *James Earle*, the Person against whom the Writ of Entry was brought, *was Tenant of the Freehold* when Judgment was given against him in the Common Recovery. And we shall begin with observing that the *Jointure* or the *Lease* could be *no Impediment* to Sir *R. A.* the Son’s suffering the Recovery; *Because* neither of the Lessees or Dame *Ann* were in Possession of the Estates, at the Time when Sir *R. A.* the Son made the Feoffment to the said *James Earle*.

* Note—
Upon his first
Argument,
He had urged
(upon the
Authority of
Bro. Abr.
Title Feffe-

* If the Court should be of Opinion, on the Authority of 2 *Anderson* 196. “That the Livery under the Letter of Attorney of *John Dacres*, vested the Freehold in his Co-Lessees as well as in “Himself; and *not in himself only*,” Then We insist that the Livery was void, because the Lessees were in Possession BY the DEED. For
ments de terres, pl. 67.) “That no Freehold passed by the Livery, to any of the 3 Lessees, except *John Dacres* who executed the Letter of Attorney to take it: Which *John* dying in 1705, the Lease expired *then*. But He did not *now* insist upon this Point: but seemed, rather, to give it up.

if

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* if Tenant for Life has a Power to make Leases for Lives, and * P. 88. makes a Lease for Life by *Livery*, the *Livery* is void; because the Lease takes Effect BY the DEED: For by Sealing the Deed, the Power is executed. 2 Levinz 149. *Wigson and Garret*. 1 Ventris 291. *The Earl of Leicester's Case*. And the *Livery* being void, the Lessees were NEVER in POSSESSION: For it is found by the Verdict, "That the Lessees or Either of them were never in Possession otherwise than BY the LIVERY."

And as the *Lease* was no Impediment, so the *Jointure* could be none. For it is found "That Dame *Ann* being in Possession by "Virtue of the Deed of Appointment, and claiming the Estate for "her Life for her Jointure, an Ejectment was brought on the Demise of Sir R. A. the Son and J. Walker his Trustee, against "Dame *Ann* and the Tenants in Possession, for the Recovery of "the Estate; and that there was a Verdict for the Plaintiff, and "Judgment on it." And "That a Writ of Possession was awarded; and that soon after the Judgment, and during the Life of "Dame *Ann*. Sir R. A. the Son entered into, and was in Possession "of the Estates; and that He continued in Possession to the Day of "his Death." By this, it appears that the *Jointure* and Possession of Dame *Ann* was REMOVED out of the Way.

It can be no Objection to the Legality of Sir R. A. the Son's Possession, "That the Judgment was not executed by a Writ of "Possession:" Since something equivalent to it is found, viz. "That soon after the Judgment, Sir R. A. the Son entered into "and was in Possession of the Estate." And there is no Rule of Law more uncontroverted, than "that a Recoveror may enter without a Writ of Execution, where the Demand is certain." The Demandant after Judgment in a Common Recovery, may enter, or take out Execution at his Election. *Shelley's Case*, 1 Rep. 106. *Mary Portington's Case*, 10 Rep. 38. Conusee may execute a Fine executory (which does not take Effect till Execution) by Entry. Bro. Tit.——The Plaintiff may have a Redisseisin, on the Statute of *Merton*, c. 3. (which gives it after a Recovery in an Affize of *Novel Disseisin* and *Delivery of Seisin by the Sheriff*;) as well where He executes the Recovery by Entry, as where the Sheriff delivers Seisin to him. The Patron who recovers in *Quare Impedit*, may present, without a Writ to the Bishop. *Hutton* 66. *Rudd v. Bishop of Lincoln*. And the Lessor of the Plaintiff may enter, after Recovery in Ejectment. 2 Sid. 156. *Sir Robert the Son* being thus in Possession of the Estate; and the Possession which is found to have been in Dame *Ann*, having been removed; The Effect and Operation of the Feoffment, comes next in Order, to be considered.

But

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* P. 89.

* This had been intimated by One of the Judges, at the End of the second Argument.

* But Mr. *Knowler* said, He would, out of the respect due to what came from the Court, take Notice of an * Intimation of one of their Lordships, expressing a Desire to hear it argued hypothetically, *supposing* the less Deed to have been first Executed, and *supposing* the Powers to have subsisted and to have been well executed, and consequently that Sir R. A. the Son was only Tenant in Tail in REMAINDER; What would be the *Effect* of the Entry of such Tenant in Tail in Remainder, under or in Consequence of a Judgment in Ejectment.

And He hoped, he said, to make it appear beyond Controversy, That Sir R. A. the Son, after his Entry in consequence of the Judgment in Ejectment, became Tenant in Tail in POSSESSION; *i. e.* became seised of an Estate Tail EXECUTED.

The Gentlemen who have argued for the Lessor of the Plaintiff, have called the Possession of Sir R. A. the Son a *naked* Possession. But He, to maintain *his* Position, would shew that the RIGHT of Possession was in Sir R. A. the Son.

There is a sound Distinction in Law, between a *naked* Possession, and a *Right* of Possession. A *Disseisor* has only a *naked* Possession: The *Disseisee* has the *Right* of Possession; For he may enter upon the Disseisor. But when a *Descent* is cast, the Right of Possession is no longer in the Disseisee; but is in the Heir of the Disseisor: For the Disseisee cannot enter upon the Possession of the Heir. So that a *Right of Possession*, and a *Right of Entry*, are convertible.

A Judgment is an *Act of Law*: And WHILST it continues in Force, it destroys the Title of the Adverse Party. A Judgment in Ejectment, by which only the Possession is recovered, not only destroys the Right of Possession which was in the adverse Party; but GIVES a *Right of Possession* to the Recoveror. And if the Judgment in Ejectment did not produce this Effect, the Lessor of the Plaintiff could not enter, or be intitled to the Writ of Habere facias Possessionem: But his having a *Right to enter* and to sue out that Writ, infers his Right to the Possession. WHILST the Judgment stands in FORCE, it removes an intervening Estate out of the Way: And during that Time, 'tis the same thing as if it had never existed. And the Recoveror's Right to the Possession will continue till the Judgment is reversed by Error, or falsified in another Action. Like the Case where the Tenant in Tail suffers an erroneous Recovery; so long as the Recovery remains in Force, it is a Bar to the Tail, and the Issue in Tail has no Right to the Estate Tail: For if the Tenant in Tail should disseise the Recoveror, and die, the Issue would not be remitted; because he has but One Title to the Land, (which is the

Title

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* Title by Descent;) And there must be two Titles in the same Per- * P. 90.
son to make a Remitter. *Co. Litt.* 349. a.

Now the Consequence of this is, That the *Right to the Possession*, and the *Remainder in Tail*, meeting in the SAME *Person*; and that Person being Sir R. A. the Son; the Possession and the Remainder in Tail UNITED, and Sir R. A. the Son became seised of an Estate Tail EXECUTED, or (in other Words) of an Estate Tail in *Possession*.

If the *Nature of an Action of Ejectment*, and the Consequence resulting from a Recovery in it, be considered, this will appear in a clearer Light.

An Ejectment is a *possessory Action*; in which almost all Titles to Land are tried: Whether the Party's Title is, to an Estate in Fee, Fee Tail, for Life, or for Years, the Remedy is by One and the same Action. In an Action of Ejectment, the Plaintiff recovers *only* the Possession of the Land: And the Execution is, of the Possession *only*. But if the Lessor of the Plaintiff recovers *ONLY the Possession* of the Land, It may be asked "*How he becomes seised according to his Title.*" To which it may be answered, That when a Person is in Possession *by Title*, (as every Person is, who enters in Execution of a Judgment in Ejectment, because the Law does no wrong,) the Possession and Title *unite*. For it is a Rule of Law, "That when a Man, having a Title to an Estate, comes to the Possession of it *by lawful means*, He shall be in Possession ACCORDING to his Title:" As where the Title is to have a Fee, He becomes seised in Fee; Where the Title is to have an Estate Tail, he becomes seised of an Estate Tail; and so on; The *Law* casting the Estate upon him *according* to his Title. And were it not so, an Ejectment would be the most ineffectual Remedy for the Trial of Titles to Estates: And it would never answer the Purpose for which it was brought into Use, if (as the Counsel on the other Side would have it) the Lessor of the Plaintiff had *no more than a bare Possession*, after an Execution or Entry on a Judgment in Ejectment. But this is not all. For a great *Absurdity* would follow, were it otherwise: A Man would have a rightful Possession, with an *immediate Remainder to himself in Tail*; A Notion which never existed, till this Case came to be debated.

What is it that converts an Estate Tail in Remainder into an Estate Tail *executed*, in any Case? Certainly, Nothing more or less than the *POSSESSION's coming* to the Remainder in Tail. For if there is Tenant for Life with Remainder to a third Person in Tail, Nothing comes to the Remainder-Man upon the Death of the Tenant for Life, *but* the Possession: For the Estate Tail was in him *before*.

A a

And

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* P. 91. And *whilst* the Estate Tail *continued* EXECUTED, Sir R. A. the Son made the Feoffment to *James Earle*: which discontinued the Tail, and vested a defeasible Fee in him: And the *Præcipe*, upon which the Common Recovery was suffered, being brought against him; and Sir R. A. the Son being a Party to the Common Recovery, as Vouchee; The Common Recovery, thus circumstanced, *barred* the Estate Tail and the Remainders over.

And though Dame *Ann* falsified the Recovery in *Ejectment* brought by Sir R. A. the Son, by the Judgment in the *Ejectment* afterwards brought by herself, Yet that Falsification had *no other* Effect upon the Estate, than to revive HER *Right to the Possession*. Like the Case just now cited, of an erroneous Common Recovery suffered by the Tenant in Tail; where, if the Issue in Tail reverses the Common Recovery by a Writ of Error, the Reversal revives *his Title to the Estate Tail*; and consequently He is then Tenant in Tail, by Reverter. So that Dame *Ann*, by Means of the Recovery in the *Ejectment* brought by herself, having the Right to the Possession, *became Tenant for Life* AGAIN, in Possession; with a *Remainder* IN FEE thereupon expectant TO THE RECOVEROR in the *Common Recovery*, or to the Person to whose use the *Common Recovery* was declared.

That Estates may *open and shut*, or be *spread and expand*, AS *Events happen*, is not unusual in our Law. If an Estate is limited to A. for Life; Remainder to his first and other Sons, in Tail; Remainder to A. and the Heirs of his Body: *Till A. has Issue*, He is seised of an Estate Tail *executed*; Upon the Birth of a Son, that Estate *opens*, and lets in the Son; and A. thereupon becomes Tenant for Life, with Remainder to his Son in Tail. And this was *Lewis Bowle's Case*, 11 Co. 80. So if Lands are limited to *All the Children*, either in Possession, or Remainder; Upon the Birth of the *first Child*, the whole Estate vests in Him or Her; Upon the Birth of *another Child*, the Estate *opens*, and takes in *that Child*; and opens in like manner on the Birth of *every other Child*. 1 *Ld. Raym.* 310, 311. *Earl of Suffex v. Temple.* 2 *Vern.* 525. *Cook v. Cook.*

But the Resolution of the Question now under Consideration does not altogether depend on the QUANTITY of the Estate which Sir R. A. the Son *had*, at the Time when he made the Feoffment: It depends on the QUALITY of the CONVEYANCE he made *Use of*.

All the Gentlemen who have argued this Case on the other Side have *blended and confounded* the SEVERAL OPERATIONS of DIFFERENT CONVEYANCES; and have not considered them with that

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* that *Distinction and Precision* that is necessary for the Solution of the * P. 92. present Question. If due Attention were given to the *Operation* of the several Conveyances which the Law has established, the seeming Difficulties of this Part of the Case would be removed.

ALL Conveyances OPERATE AS a FEOFFMENT, OR AS a GRANT.

A FEOFFMENT operates on the *Possession*; without any Regard to the Estate or Interest of the Feoffor. A GRANT operates on the Estate or Interest which the Grantor has in the Thing granted. But, to be more particular—According to Lord Coke's Enumeration, a Man may purchase or convey Lands by Ten Manners of Conveyance; viz. by *Feoffment, Grant, Fine, Common Recovery, Exchange, Release, Confirmation, Grant of Reversion with Attornment, Bargain and Sale, Will*.

To make a *Feoffment* good and valid, Nothing is wanting, but *Possession*: And where the Feoffor has Possession, though it be as BARE and NAKED as the Gentlemen would have it, yet a Freehold or Fee-Simple passes, by reason of the *Livery*. *Poph.* 39. *Litt.* § 595, 599, 611, 698. *Co. Litt.* 366. b. 367. a.

A Grant passes Nothing but what the Grantor may LAWFULLY grant. *Poph.* 39. *Litt.* § 608.

A *Fine* and *Common Recovery* are likened to a Feoffment: For One is called a Feoffment of Record, and the other is said to be in Nature of a Feoffment of Record. That which occasions the *Likeness* between a Feoffment Fine and Recovery, is, That they ALL PASS A FEE; THOUGH the Feoffor, Conusor, or Tenant HAVE none. *Co. Litt.* 9. b. But, to give them this uniform Operation, the Conusor in the Fine, and the Tenant to the *Præcipe*, must be seised of a *Freehold*; i. e. an Estate for Life, at least: Otherwise, the Fine may be avoided, by the Plea of "*Partes Finis nil habuerunt*;" and the Recovery, by the Plea of Non-tenure, i. e. "That the Person against whom the Writ was brought, was not Tenant of the Freehold, by Right, or by Wrong." By this, it appears that a *Fine* and a *Common Recovery* are both void, for want of a *Freehold*: But it no where appears, notwithstanding what has been urged, that an *Estate* in the Feoffor, is necessary, to support a FEOFFMENT. But it does appear, and I have a great Authority for it, that it is no Plea, in Avoidance of a Feoffment, to say "That the Feoffor has Nothing in the Land, at the time of the Feoffment;" because the Land passes by the LIVERY: If the Operation of the Feoffment is questioned, the only Plea is "*Nenfeoffa pas*;" which puts in Issue only the LIVERY. This is the Opinion, and this is the Language of Littleton: 10 Ed. 4. 8, 9.

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* P. 93. * ALL OTHER Conveyances, as *Exchange, Release, Confirmation, Grant of Reversion, Bargain and Sale, Will*, pass nothing but what the Grantor may *LAWFULLY convey, WITHOUT Livery*; and, on that Account, are in the *Nature of a Grant*. *Litt.* § 606, 607, 609, 610. *Hardr.* 410. *Edwards v. Slater*. It is the Operation of THESE Conveyances, that the Gentlemen, in the Course of their Argument, have APPLIED to a FEOFFMENT: But with what *Propriety*, is submitted to the Court, upon what is now disclosed.

But it has been said, “That such a Feoffment as this, may be made by ANY Person in POSSESSION; and if established, will introduce a NEW Law in *Westminster-Hall*, CONTRARY to all FORMER Rules and Doctrines.”

* V. ante,
pa. 80.

To which Objection, The Answer is, “That it is most clear, that a Feoffment MAY be made by ANY Person in POSSESSION:” For ’tis the Doctrine the Law teaches; and it has been the Language of the greatest Professors of it. Lord Coke, in his Comment on the 25th Chapter of *W. 2.* (which gives a Writ of *Novel Disseisin*, where Tenant for Years aliens in Fee, by Feoffment,) grounds his Distinction between Cases which are within the Act and Cases which are not within the Act, on POSSESSION ONLY. For he says, “Though the Act speaks of an Alienation by Feoffment, by a Tenant for Years; Yet it extends to Tenant by *Elegit*, Statute-Merchant, Statute-Staple, Tenant at Will, and Tenant at Sufferance; BECAUSE All these have a POSSESSION: But it is otherwise of a Bailiff; For he hath no POSSESSION at all.” This shews how greatly One of the Gentlemen is mistaken, when He asserts “That a Conveyance of an Estate of Freehold, by a Tenant at Sufferance would be VOID *:” Since it appears by the Statute, and by the Comment upon it, “That a Feoffment by a Tenant at Sufferance (who has no more than a bare Possession) will unquestionably pass a Freehold,” And the Case of *Butler v. Buckmanton*, *Cro. Jac.* 169. proves no more than that the Release of Tenant in Tail to a Tenant at Sufferance, is not good for want of a Privity between them. Besides, a Release, (as has been already observed,) passes no greater Estate than the Releaser can lawfully convey.

Lord Ch. Just. Holt lays it down as clear Law, in the Case of *Hunt v. Burn*, *H. 1 Annæ*, “That if Lessee for Years makes a Feoffment with Livery; though the Lessor be on the Land, protesting against it, yet the Land passes; because the Lessee was intitled to the Possession.” And Lord Ch. Just. Holt is supported in his Opinion, by the Case of *Read and Morpeth v. Errington*, *Cro. Eliz.* 321. where the Question was, “if a Feoffment by Lessee for Years, the Lessor being upon the Land, was a good Feoff-

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“ * Feoffment :” For it was pretended that his being upon the Land * P. 94. guarded the Land, so that no Feoffment could be made. But the Court was of Opinion that the Feoffment was good ; “ *because* the Lessee had the sole Right to the POSSESSION ; and Livery ought always to be given of the *Possession*.”

Notice has been already taken, that it is *no Plea* in Avoidance of a Feoffment, to say “ that the Feoffor had Nothing in the Land at the Time of the *Feoffment*.” Let Us here add the *Form of Pleading a Feoffment*, by Tenant for *Life*, and Tenant for *Years* ; Good Pleading being an infallible Test of the Law. If Feoffment in Fee is pleaded by Tenant in Fee, the Conclusion is “ That the Feoffee “ was by virtue thereof seised in Fee :” And the *same* Conclusion is made on the Feoffment in Fee of the Tenant for Life and Tenant for Years, “ that by Pretext thereof the Feoffee was “ seised *in Fee*.” The Entry of *Albany's Case* in 1 Rep. 108. is a Proof of this.

It appears by *Jenning's Case* in the 10th Rep. 43. “ That the “ Feoffee of Lessee for *Years* was a good Tenant to the *Præcipe*.” In the Case of *Smith v. Parkhurst*, or *Dormer and Fortescue*, it was admitted that there *would have been* a good Tenant to the *Præcipe*, if Mr. Just. *Dormer* had made a Feoffment. And the Question in Sir *William Pelham's Case*, 1 Co. 14. b. is an Admission “ that the “ Feoffment of Lessee for *Years* will pass a *Freehold*.”

“ That *Possession* ONLY would support a Feoffment,” was the Doctrine at *Westminster-Hall*, in *Elder Times*. In *Perkins* (a Book of no mean Authority,) Section 200. it is laid down as a Rule, “ that WITHOUT *Possession*, a Man cannot make Livery.” A Feoffment by the Lessee for Years, though the Lessor be upon the Land, passes the Land : And the Reason for this is rendered in the Book ; “ *because* the Lessor had nothing to do with the POSSESSION.”

It was the Law, when Lands were devisable only by Custom, that a Man might devise “ That his Lands should be sold by his “ Executors.” In which Case, the Lands descended, upon the Death of the Testator, to his Heir at Law : And the Executors took no Interest by the Will. *Babington*, a learned Judge, in putting this Case, and taking Notice of the Feoffment of the Executors, makes this Remark : “ *And so*”, says He, “ A Man may have a “ *lawful Freehold*, from a Person who *had Nothing* in the Land ; as “ a Man may have Fire from a Flint, which has no Fire in it.” And He further illustrates his Conclusion, with the Instance, “ that “ a Woman shall recover her Dower (which is an Estate for Life) “ against a Guardian in Chivalry, who *has no Freehold*.” 9 H. 6. 24.

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* P. 95. * In 10 H. 8. 10. It is mentioned as a Thing notorious, "That those who have no Freehold may convey a Freehold." The Conveyance which will pass a Freehold from a Person who has none, must necessarily be a Feoffment: Since there is NO OTHER Conveyance in the Law, which will produce the like Effect.

Before the Statute of Uses, a *Cestuy qui Use* conveyed the Use by Bargain and Sale; and afterwards levied a Fine to a Stranger. And the Question was, Whether the Fine was not void; as neither of the Parties had any Thing in Use or in Possession: For by the Bargain and Sale, the Use was in the Bargainee; and Nothing was in the Bargainor, or in the Stranger. It was argued that if this Fine was not good, great Inconvenience would follow: For that many Recoveries had been suffered against the Bargainor, after he had conveyed the Use. To this *Fitzberbert* replied, "It is the Folly of Purchasers, that they do not take a FEOFFMENT from the *Cestuy qui Use*, before the Fine is levied: For IF they do, the FINE will be GOOD. I, for my part, says He, will never purchase any Land WITHOUT taking a Feoffment; So THAT I may be in Possession when the Fine is levied: For then the Fine will undoubtedly be good." 27 H. 8. 20. The Possession here spoken of, must be a Freehold at least; because Nothing less than a Freehold will support a Fine: For if neither Conuzor or Conuzee have an Estate of Freehold in Possession Remainder or Reversion, at the Time of levying the Fine, the Fine is void. The FEOFFMENT here spoken of, is the Feoffment of a *Cestuy qui Use*, after He had parted from the Use, and whilst the Freehold and Inheritance of the Estate was in the Feoffees: So that it was the Feoffment of a Person who had ONLY a BARE and NAKED Possession (unaccompanied with RIGHT,) to a Stranger. The Feoffment could not have been made good by the Statute of 1 R. 3. c. 1: because, after the Bargain and Sale, the Use was in the Bargainee; and the Feoffor was no longer *Cestuy qui Use*. This was the Opinion, and this was the Practice of one of the greatest Lawyers of the Age in which He lived: For it is said, that *Fitzberbert* and *Baldwyn* were the greatest Lawyers of that Age. The Observations upon the Opinion of *Fitzberbert*, are, That if a Feoffment from the *Cestuy qui Use* to a Stranger, after He had conveyed the Use, would have made the Fine undoubtedly good; the LIKE Feoffment would have made a good TENANT TO THE PRÆCIPE: And for this plain Reason; "because the Feoffment PASSED a FREEHOLD." How would this great Judge have been surprized, to have heard the Operation of a Conveyance which He relied on as the Basis of his Titles to his Estates, doubted and debated! This Case is an additional Authority, "that the Feoffment of a Tenant at sufferance will pass a Fee." For after the *Cestuy qui Use* had conveyed the Use by Bargain

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* gain and Sale, He was *no longer* a Tenant at *Will*, to his Feoffees. * P. 96. It is likewise a Proof "That the Feoffment of a *Deforcor*, who " is a *wrongful With-holder*, *passes a Fee*." For after the Bargain and Sale, the *Cestuy qui Use* had *no Right to the Possession*; but was a *wrongful with-holder*. Upon this, It is submitted, Whether the Confirmation of this Doctrine, by the Judgment of the Court, will introduce a NEW Law into *Westminster-Hall*, CONTRARY to all FORMER Rules and Doctrines; Or whether it will not rather REVIVE a Doctrine almost worn out of Memory. It is so long since a Feoffment was in Common Use, that it is no wonder the Gentlemen should think the Doctrine NEW; and that the PROPERTIES of a Feoffment should be so little known.

But it has been said "That the Feoffment of Tenant in Tail in " *Remainder expectant* upon an Estate for Life, will NOT make a " DISCONTINUANCE; though the Feoffment was made with the " Consent of the Tenant for Life:" And for this, the Case of *Swift v. Heath*, *Carthew* 109, 110. was cited. This must be admitted: Because a Feoffment does not make a *Discontinance*, unless the Tenant in Tail is seised of the Estate Tail, in *Possession*. But does this Case prove "That a Feoffment by a Remainder-Man with the " Consent of the Tenant for Life, is VOID?" Nothing less. The Question, in the Case cited, "Whether the Feoffment made a *Discontinance*," admitted the Feoffment to be GOOD: For the Doubt was upon the Operation of it.

To put an End to the Question, There is a Case, in which it was determined "That the Feoffment of him in Reversion or Re- " mainder, in the ABSENCE of the Tenant for Life, is a GOOD " Feoffment." It is in *Dyer* 340. The Case was, That he in Remainder in Fee enfeoffed a Stranger, in the Absence of the Tenant for Life; who neither attorned, nor assented to the Feoffment, but occupied the Estate, during his Life: And it was holden to be a GOOD Feoffment for the Fee-simple. Where is the Difference between this Case, and the present? In the Case before the Court, was not the Feoffment made by the Remainder-Man, in the Absence of Dame *Ann*, the Tenant for Life? Did she ever attorn, or assent? And did not She occupy the Estate, during her Life? The only Difference that can be pretended between the two Cases, is, that in One, the Remainder-Man was Tenant in Fee; in the other, Tenant in Tail. But will that make any Difference? 'Tis impossible it should: Because the Feoffment in both Cases, took Effect by the *Livery*.

It has been further said, "That Sir R. A. the Son could not " convey a Freehold by a *rightful* Conveyance; as by Fine, Re- " lease, or Bargain and Sale: And if not by a *rightful*, he could " not do it by a *wrongful* One."

Here

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* P. 97. Here is a Distinction made, which was never met with. According to their Notion of Instruments of Conveyance; a Fine, Release, and Bargain and Sale, are *rightful* Conveyances: A Feoffment, a *wrongful* One. Whereas it is most manifest, that ALL Conveyances are, in themselves EQUALLY *rightful*, and are to be made use of, according to the Nature of the Case to which they are applicable: And their being *rightful*, or *wrongful*, does not depend upon their Names or their Properties. That a Freehold will not pass, by a *Fine, Release, or Bargain and Sale*, from a Person who has ONLY a BARE and NAKED Possession, (for *that* is the Subject We are now upon,) does not proceed from those Conveyances being *lawful* Ones; but from the *Nature* of those Conveyances; whose *Property* it is, to convey Nothing but what the Maker of them may *lawfully* convey; *because they operate* as a GRANT. Therefore, to infer *from thence*, "That a Freehold will not pass by a FEOFFMENT," a Conveyance of a *different Operation*, and *whose Property* is to pass a Freehold and Fee, by *Force of the LIVERY*, is an inconclusive Argument.

Another Observation has been made, "That if the Law considers that *some* Persons have this Power, (to make a Feoffment,) and *others* have not; the Law will never suffer that to be done by *Fraud*, which cannot be done fairly and regularly."

Answer. Every one who *can* GET INTO POSSESSION, has and ever had a POWER to make a Feoffment: And the Law makes no Distinction of Persons. And whenever a Tenant in Tail in Remainder has obtained the POSSESSION, (*whether by Right, or by Wrong,*) and has done an Act, *whilst in Possession*, to make a Tenant to the *Præcipe*, in order to suffer a Common Recovery; No Instance can be produced, where such Act has been *adjudged fraudulent, unfair, or irregular*.

It is very common, in Practice, for Tenant for Life to surrender his Estate to the Remainder-Man in Tail, *conditionally*; in order to give the Tenant in Tail in Remainder an Opportunity to bar the Estate-Tail and the Remainders over: And though such surrender is a *mere Contrivance* between the Tenant for Life and the Remainder-Man in Tail, yet no Common Recovery was *ever avoided* on that Account.

If Tenant in Tail in Remainder *disseises* the Tenant for Life, and during the Continuance of the Disseisin suffers a Common Recovery; By their own Admission, the Common Recovery is NOT *avoidable* by Reason of the *Disseisin*. So, where Trustees to preserve contingent Remainders during the Life of a Tenant for Years, have conveyed the Freehold, to make a Tenant to the *Præcipe*, in order to
give

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* give the Remainder-Man in Tail an Opportunity of suffering a * P. 98. Recovery; there is no Instance of *such* a Recovery being *set aside* at Law, upon a *supposed Practice* between the Tenant for Years, the Trustees, and the Remainder-Man in Tail. And if a Remainder-Man in Tail, who comes *to the Possession* by a *wrongful Act*, or by *Stratagem* and *Contrivance*, may make a Tenant to the *Præcipe*, in order to suffer a Recovery; Surely, a Remainder-Man in Tail who comes to the Possession by a *Lawful Act*, may do the same.

Where *Tenant in Tail is Party* to the Recovery as Tenant or as Vouchee, Such Recovery is not in the Eye of the Law either fraudulent or collusive: Because THE LAW *has made* the Estate Tail, and all the Remainders, and the Reversion expectant on it, *SUBJECT to the PLEASURE of the Tenant in Tail*, and given HIM a RIGHT to BAR THEM ALL. If a Reversioner expectant upon an Estate Tail *could avoid* a Recovery suffered by the Tenant in Tail, *as fraudulent, collusive, unfair, or irregular*; the Law would have devised some *Means* for avoiding it: And the Reason why there are no such Means, is, because a *Reversion* expectant on an Estate Tail is of *no Consideration* in Law. A Reversion expectant on an Estate Tail is *no Assets*. The Reversioner cannot FALSIFY a Common Recovery suffered by Tenant in Tail: Neither is *Resceit* given by the Statute of *W. 2. c. 3.* to a Reversioner on an Estate Tail. The Reason of all this is, *because* the Estate Tail is an Inheritance which *may continue for ever*. There is *no Provision* by the Statutes of *32 H. 8. c. 31.* and *14 Eliz. c. 8.* to *preserve* a Remainder or Reversion expectant on an Estate Tail; as there is, when they are expectant on an Estate *for Life*, and the Tenant for Life is only vouched.

But *Fermor's Case*, *3 Co. 78.* has been objected: As if there was no Difference between a Fine or Recovery *by Tenant for Years* Tenant for *Life*, or a *Copyholder*, by *Covin*, to the Intent to bar the Reversioner or the Lord of his *Inheritance*; and a Recovery suffered by *Tenant in Tail*, to the Intent to bar the *Estate Tail and the Reversion*.

It has been Matter of Surprize, to hear the Gentlemen mention the Statute of *14 G. 2. c. 20.* Because that Statute is made in *Aid* of Recoveries; and *not* to invalidate them; and more especially, as there is a Proviso in the Act, "that it shall not be construed to prejudice or affect any Question in Law, which may arise upon Common Recoveries not remedied or intended to be remedied by it: But all *such* Common Recoveries are to remain and be of such Force and Effect as they would have been, if the Act had not been made." Besides, there is a Proviso in the Act "that no Common Recovery shall be called in question *after 24 Years.*"

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* P. 99. * The principal Argument which the Gentlemen have opposed to the Doctrine which We have been endeavouring to support, may be reduced to the Head of INCONVENIENCE: And they have argued upon it, as if the Decision of the Question depended on *private Opinion*, and not on the LAW. But the Question is *not*, “*What INCONVENIENCE will attend the Determination, either Way?*” But “*WHAT is the LAW.*” The Inconvenience, (if there be One,) *arises* from the NATURE and OPERATION of a FEOFFMENT; and cannot be avoided, but by *taking away* that Conveyance, or *depriving* it of an Operation which it has been allowed to have, by all the Sages of the Law. But to do *this*, is NOT in the Power of a Court of Justice: Since No Maxim of the Common Law can be abrogated or abolished, *but* by a LEGISLATIVE Authority.

It was *once* thought to be a great Inconvenience, “that a Descent, *immediately after* a Disseisin, *should take away the ENTRY* of the Person disseised.” At another Time, It was thought to be no small One, “that the Son should *lose his Patrimony*, because he happened to be *born out of Time.*” And till lately, an Heir might have been deprived of his Family-Estate, by the Warranty of an Ancestor who *was never in Possession* of it.

The Inconveniences occasioned by the Maxims I have just now hinted at, were *as great* as that which is pretended to arise from the Feoffment of a Tenant in Tail in Remainder expectant upon an Estate for Life: and yet they continued through Ages of the Law, till the LEGISLATURE took them away. The Inconveniences which attended the Law in those Instances were as *universal* as any that can be suggested to follow from the Doctrine We have been endeavouring to support: And yet Courts of Justice never thought themselves warranted to depart from the Law.

Could the Courts of Common Law have determined “that a Descent, after a *recent* Disseisin, did *not* take away an Entry;” without determining at the same time, “That a Descent does NOT take away an Entry?” Could they have determined that a Posthumous Child *should take*, though the Estate which was the Support of the Limitation to it, determined before it’s Birth;” without resolving at the same Time “that a *contingent* Remainder should take Effect, though it did *not* VEST during the Continuance or upon the Determination of the Estate created for its Support?” Or could they have determined “that an Heir should take an Estate, notwithstanding the Warranty of his collateral Ancestor;” without determining “That Collateral Warranties did *not* bind?” And can the Court determine, in the present Case,

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* Case, "That the Recovery is *void*;" without adjudging "That * P. 100.
" a Feoffment has *not* the Operation, which it HAS HAD *ever since*
" it became a Common Assurance?"

When the Law is *doubtful*, it is allowable to draw an Argument from Inconvenience: But where the Law is *clear* and *precise* (as it is "That the Feoffment of a Person in Possession, let him come to that Possession *how* he will, *passes a Fee*;") An Argument from Inconvenience is NOT *admissible*; because it tends to undermine and overthrow the Law.

Much has been said of DISSEISIN; and many critical Observations have been made upon that Subject, in Order to shew that Sir R. A. the Son could not be a *Disseisor*. All that needs be said to them, is, That Sir R. A. the Son entered by *Right* OR by *Wrong*; (For there is *no* Medium :) And, "that He entred and took the " Profits," is admitted. Now IF He entred of his *own Wrong*, He was a *Disseisor*; For He ousted the Tenant for Life: And if He was a *Disseisor*, it is agreed there was a good Tenant to the *Præcipe*. IF He entered by *Right*, then (for the Reasons already offered) He *had Power* to make a Tenant to the *Præcipe* by his Feoffment. So that in *either* Case, James Earle was a GOOD Tenant to the *Præcipe*, at the Time when Judgment was given in the Common Recovery. And so He was warranted, He said to conclude, That the Recovery is good, and barred the Estate Tail limited to Sir R. A. the Son; And consequently, the Remainder in Fee, which was limited to Sir R. A. the Father, and by him devised to the Lessor of the Plaintiff.

The Fourth Point or Head.—Supposing the Recovery to be good, ^{4th Point.} Whether the RE-ENTRY of Dame Ann, under the Recovery and Judgment in the second Ejectment, did AVOID it.

The Gentleman who made this Question, said "It seemed to be " of considerable Weight." Whether it be so or not, We shall see presently. What He undertook to maintain, was "That the Entry " of Dame Ann, after She had recovered in the second Ejectment, " REVESTED her Estate for Life and the Remainder in Fee; and " put the Estate in the SAME *Plight* it was in before the Common " Recovery was suffered." And to make this out, He compared the Entry of Dame Ann to the regrefs of the *Disseisee*, which voids all intermediate Acts, by Relation; and made that Instance the Foundation of his Argument.

Mr. Knowler here observed, how inconsistent *this* Argument of the Gentleman was with his *former*. The Direction and Force of his former Argument under the last Head was to shew "That Sir R. A. the " Son

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* P. 101. " * Son entered *by Title*, and could *not Possibly* be a *Disseisor*." The Drift of *this* Argument is to prove him to *have been* a Disseisor. This shews how difficult it is to be consistent, when a Person would reconcile Matters not supportable.

The Question is not to be determined by the Rule or Instance which the Gentleman has applied to it; but upon *this Distinction*, "Where the *entire* Estate is defeated," and "Where *ONLY Part* of the Estate is defeated, by One who has a prior Title." The Case which the Gentleman puts, falls under the *first* Member of the Distinction: The *present* Case falls under the *second* Member of it.

The subsisting Estate, at the Time when Dame *Ann* entered under the Judgment in the second Ejectment, was an Estate in *Fee* in *Robert Atkyns* the Nephew and Heir of Sir *R. A.* the Son. *All* the Interest that *She* could derive to *herself* by Force of the Judgment in the second Ejectment, was an Estate for *LIFE*: For *She* could recover no otherwise than *according to her Title*. And therefore Dame *Ann's* Entry under that Judgment *could have no other Effect* than to *diminish and lessen* the Interest of *Robert Atkyns*, by *taking out of it* an Estate for *HER Life*. This will appear by some Instances which shall be mentioned. Tenant for Life surrenders his Estate to the next Remainder-Man in Tail, *conditionally*; to enable the Remainder-Man to suffer a Common Recovery; A Recovery is suffered: And, the Condition being broken, the Tenant for Life re-enters; The Re-Entry of the Tenant for Life will *not* avoid the Recovery, and revive the Estates that were barred by it. This appears by every Day's Experience. One of the Gentlemen seemed to admit the Law to be so; and accounted for it, by saying, "It is because the Tenant to the *Præcipe* was made by Force of a "rightful Estate." But *that* is *not* the Reason. The *true* Reason is (what has been already mentioned) "That *ONLY Part* of the Estate is defeated by the Entry of the Tenant for Life; and *not* the *ENTIRE* Estate. A Tenant for *Years*, or by *Elegit*, can avoid or falsify a Recovery, *during* their particular Estates *only*. A *Wife* can avoid a Recovery suffered by her Husband alone, as to her Title of *Dower* only, and *no further*. Remainder-Man in Tail, expectant on an Estate for Life, disseised the Tenant for Life, and levied a Fine with Proclamations; The Tenant for Life entered on the Conusee: And it was determined "that notwithstanding the *Regress* of the Tenant for Life, the *Reversion* remained in the Conusee, *not defeated*." And this was the Case of *Oke's ex dimiss*. Lord *Sturton*; which is cited in *Popham* 65, 66. Lessor disseises his Lessee for Life, and makes a Lease for Life to another; The first Lessee re-enters: He leaves the *Reversion* in the second Lessee for Life

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* Life; who shall have the Rent reserved on the first Lease. Earl * P. 102. of Gloucester's Case, cited in Sir Moyle Finch's Case. More Proofs might be brought, to confirm this Part of the Argument: But in so plain a Case, *these* may suffice. And with them We may conclude, That the RE-Entry of Dame Ann, under the Recovery and Judgment in the second Ejectment, *did NOT avoid* the Common Recovery suffered by Sir Robert Atkyns the Son.

And let it be observed, that the Arguments made Use of, have *not* been drawn from General Reasons and Reflections; but have been suggested from AUTHORITIES, and from the EXPERIENCE AND PRACTICE of Learned Men.

Upon the whole, he prayed Judgment for the Defendants.

In Reply—It was urged on Part of the Plaintiff—

1st, As to the great and little Deeds—That the little Deed did ^{1st Point.} *not* revoke the greater One, or *destroy the Powers* thereby given. Which was supported chiefly by Arguments drawn from the Deeds themselves.

As to the * Lease to the Dacres being fraudulent, (*V. ante* 85.) ^{2d Point.} The Case in *Savile* 126. is not like the present: For *here* were *express legal Motives* for making the Lease; whereas there were none, ^{* Here is a like Omission as to the Argument concerning the} in that Case, for making the Feoffment.

Validity and Determination of the Lease to the Dacres, as in the adverse Argument. See the Notes on pa. p. 83, 87. l. 19. 104, & 105. in *Margaine*.

As to *Livery*—It was not necessary: And therefore void. *1 Ventr.* 291.

As to the Recovery—The Authorities are not *ad idem*: ^{3d Point.}

Nor as to the *Feoffment*. For this is a FICTITIOUS Possession, and in *Nubibus*: NOT an *actual* Possession. No *Freehold* is recovered in Ejectment. So that Sir R. A. the Son was *not* Tenant in Tail in POSSESSION, for *want* of the *Freehold*. And without being Tenant of the Freehold, the Recovery could not be valid. Mr. Knowler admits “That the Possession of the *Bailiff* would not do.” (*V. ante* 93.) And surely, this Case is stronger than that of *Bailiff*.

As to *Cro. Jac.* 169. the Case of *Butler v. Duckmanton*. (*V. ante* 80. & 93. The Possession of the Tenant at *Sufferance* was considered as *no* Possession at all, in that Case. Therefore We may admit all Mr. Knowler's Cases: Because they do not come up to the present Case of Sir R. A. the Son's Possession. Consequently, The

D d Remainder

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* P. 103. Remainder is not affected by any thing done under this *nugatory* Possession.

Dame *Ann* was Tenant of the Freehold: And without disseising Her, there could be no Tenant to the *Præcipe*, who would be Tenant of the Freehold. Sir R. *A.* the Son did not enter *as* a Disseisor; but as having a Title. And he had a Title under the Judgment, to enter. And the Estate which passed by the Feoffment, was according to his Right. 2 Ro. Abr. 5. Co. Lit. 52. b. And the Warranty extended only to the Fictitious Title in Ejectment. The Possession *only* was transferred to Him; *not* the Freehold: And this was a mere *naked* Possession; an *accidental* Possession. *Cartbrey* 110. proves that the Remainders were not discontinued for want of Tenant to the Freehold. Dame *Ann* was never out of Possession of the *Freehold*.

So that the Estate which Sir *Robert* gained by his Entry upon Dame *Ann* could *not* be an Estate Tail in *Possession*; because there was a prior rightful Estate for *Life* in ANOTHER Person. Therefore it must be an Estate Tail in REMAINDER.

It is asked, “*When* He *first* began to hold over unlawfully? The answer is—From his *first* Entry.

HIS ENTRY was *not wrongful*: Therefore He cannot be considered as a *Disseisor*. But He HELD OVER, *unlawfully*. 'Tis like a Tenant by Sufferance; or a Man who enters upon the King, (who cannot be put out of Possession;) or a Man after the Death of his Wife, &c. And it is not easy to apprehend the Distinction between entering “*under* the Ejectment;” and entering “*in pursuance* of the “Ejectment.” Consequently, his was a *mere naked Possession*: And the Freehold remained undisturbed in Dame *Ann*.

As to the Fraud and collusion of Suffering a Recovery—There is surely such an *Insufficiency of Estate* in a Tenant in Tail in Remainder, that He cannot suffer a Common Recovery. And surely the Court will not permit a Person who cannot be a Tenant to the *Præcipe* Himself, to MAKE a Tenant to the *Præcipe*. And they strongly urged the vast *Inconveniences* that must attend this Doctrine now advanced, “That a Tenant in Tail in *Remainder* only, who “can obtain a mere *naked Possession*, may legally suffer a Recovery “and bar the subsequent Remainders.”

4th Point.

Fourth Point.—As to the RE-Entry of Lady *Ann*—The Verdict did nothing: It is the *Entry* that reverts. It *reverted* HER *Estate*, which was an Estate for *Life*: Whereas Sir R. *A.* the Son's Entry under his Verdict only operated to give him a *naked Possession*; He
1 having

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having no Right to an Estate Tail IN POSSESSION. And He could * P. 104. not be Tenant in Tail in *Possession*, to *One* Purpose; and in *Remainder*, to *Another*. Then Her Re-Entry left him Tenant in Tail in Remainder, as it found Him.

In the Case in 2 Ro. Abr. 421. Title *Remitter*, Letter i. pl. 1. The Wife entered under an Act of Parliament, which remitted Her.

5th Point, (as to the Remedy.) The Plaintiff is * NOT *barred* of his Entry; by the Statute of Limitations 21 J. 1. c. 16. For the Recoveree was not intitled to suffer a Recovery; Not being Tenant in Tail in *Possession*.

5th Point.
• The Rest of this Argument is omitted; for the Reasons given in the subsequent Note.

As to Dame *Ann*'s Recovery in the Ejectment brought by *Miles*—The Demise was laid so far back as to over-reach the whole Term which Sir R. A. the Son had recovered: It was laid so far back, as to 5 Days after the Death of Sir R. A. the Father. And Her Estate had never been discontinued; nor her Right of Entry taken away. So that Sir *Robert* the Son was never Tenant in Tail in Possession. The Lessor of the Plaintiff could not therefore enter till the Jointure of Dame *Ann* was at an End, and her Life-Estate determined. Neither could he enter, so long as the Lease to *the DACRES* was in being: Which did not expire till the Death of *Thomas Dacres*, the Surviving Lessee, on 23d July 1752.

Note—The last of the four Arguments of this Case was intended chiefly for the Information of Lord *Mansfield*, who had not heard any of the former.

BEFORE it came on, his Lordship (having read the Case, and seen Notes of all the former Arguments, sent for the Counsel and Agents on both Sides; and told them, that a Point occurred to Him, which did not seem to have been particularly attended to in drawing up the special Verdict, and which He observed had been very little gone into in any of the former Arguments; That it seemed to Him material; And therefore He wished to have it spoken to: And He chose to apprise them of it before-hand, to avoid further Expence and Delay to the Parties; because if He should defer mentioning it, till after He had heard them in Court, and if they should omit going fully into that Point in their Argument, and His Lordship should continue to think it material, it must occasion a new Argument.

The Point was, “Whether, *supposing* the Recovery to be bad, yet the Plaintiff's EJECTMENT was not *barred* by the Statute of *Limitations*.”

That

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* P. 105. * *That* depended, He said, upon many Considerations, which He desired them to think of: As, first, Whether the *Lease* was made *pursuant to the Power*, or, (in other Words,) Whether the *Lease* was *void*, as *not* being made pursuant to the Power; (2dly) Whether it was *not determined*, upon the Extinction of the Estate Tail in 1711; (3dly) Whether, *as* this Special Verdict was found, an Objection from the Statute of Limitations was *now* open to be made. And He mentioned some Cases to them, which he desired them to look into.

Accordingly, upon this last Argument, the said Question was very fully discussed, on both Sides: But, to avoid Prolixity, I have omitted to report *these Arguments of the Counsel*; because every thing material upon * this Point will appear from the following unanimous Resolution of the Court, given by Lord Mansfield.

* They fell under the 2d Point. See ante, pa. 83. in the Margin; and pa. 87. & 102.

LORD MANSFIELD now delivered the Resolution of the Court; (Having first stated the Case and Special Verdict.)

Sir Robert Atkyns the Son being dead without Issue Male, the Reversion in Fee, devised to the Lessor of the Plaintiff, is come into Possession: And consequently, he must be intitled to Judgment in this Ejectment; unless the Defendant can set up a *Bar* to his RIGHT, or to his REMEDY by an Ejectment.

They set up a Bar to BOTH.

In Bar of his RIGHT, they insist upon the *Common Recovery* suffered in Hilary Term 9 Ann. A. D. 1710. In Bar of his REMEDY, they insist upon the *Statute of Limitations*.

The *Common Recovery*, if duly suffered, certainly destroyed the RIGHT of the Lessor of the Plaintiff. The *Statute of Limitations*, if his Title of Entry accrued above 20 Years before the 15th of December 1752, has certainly taken away the REMEDY BY EJECTMENT.

The Merits therefore must depend upon two General Questions.

1st, Whether the said *Common Recovery* was *duly suffered*.

2d, Whether this *Ejectment* is barred by the *Statute of Limitations*.

First General Question.

As to the first, The Objection is, That there was *not* a good *Tenant to the Præcipe*: For, Lady Atkyns, the Widow of Sir Robert the

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* the Father, had an Estate for Life in the Premises; and did not * P. 106
join, by Surrender or otherwise, in any Conveyance of the Freehold
to *James Earle*, the Tenant against whom the *Præcipe* was brought.
(There is no Occasion to entangle this Part of the Case with the
Demise to the 3 *Dacres*.)

The Defendants contend that there *was* a good Tenant to the
Præcipe, upon two Grounds; (1st) Because Lady *Atkyns* had no
Estate for Life; and so Sir *Robert* the Son, was Tenant in Tail in
Possession; 2dly) Suppose She had an Estate for Life, yet *Earle*
was a good Tenant to the *Præcipe*, by *Disseisin*: Which they en-
deavour to prove two Ways, *viz.* 1st, That Sir *Robert Atkyns*, by
his Entry, was *Himself* a *Disseisor*, and by his Feoffment the 17th
of *January* 1710. conveyed the Freehold he had *acquired* by *Dis-*
seisin, to *James Earle*; and 2dly, Suppose Sir *Robert* the Son was
not a *Disseisor*, yet his said *Feoffment* *was* a *Disseisin*, and made
James Earle a good Tenant of the Freehold by *Disseisin*.

As to the first Ground, “That Lady *Atkyns* had *no Estate for*
“*Life*,”—The whole Argument depends upon this Proposition,
“That the Lesser Deed was executed *after* the Greater Deed; and
“consequently, the Power to Sir *Robert Atkyns* the Father, to make
“a Jointure, was *extinguished* by the Fine levied in *Trinity* Term
“1669.” But the Jury have not found the Fact, “*which* was
“*first* executed.” Both Deeds bear the same Date. They are
both consistent. They are both manifestly but one Agreement, ex-
ecuted by different Instruments, to answer different Purposes, and
to suit (probably) the Convenience of one Party, who was interested
only in a small Part of the Transaction.

The Fine levied in *Trinity* Term 1669 pursued both Deeds,
and comprizes all the Premises in the greater Deed, by which the
Powers were created.

It never could be the Intent, to revoke these Powers, at the
Instant they were created; by the lesser Deed, which makes no
Mention of them; or by a Fine levied, agreeable to the greater
Deed, in which they are contained.

Sir *Robert Atkyns*, who survived the Transaction above 30 Years,
has shewn by many Acts, that he understood the Powers to be
well created and subsisting.

If it was necessary, We ought to presume the lesser Deed first
executed, to support the clear Intent of Parties, in a Family Settle-
ment made for valuable Consideration; For it is impossible to sup-
pose,

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* P. 107. * pose, they could really mean to revoke or extinguish these Powers, and take this way of doing it. But, in this Case, there is no Room for Presumption: The Internal Evidence of the thing itself, speaks them to be one Transaction; and the same, to all Intents and Purposes, as if expressed in one Instrument.

As the Jointress clearly had an Estate for Life, the *next* Ground is "That James Earle was a good Tenant to the *Præcipe*, by *Disseisin*."

The better to judge of this Question, It may be proper to try to find out What the *old Law* meant by a *Disseisin* which constituted the Tenant of the Freehold, in respect of every Demandant suing out a *Præcipe*; although the Owner's Entry was *not* taken away: (For where the *Right of Possession* was acquired, and the Owner put to his real Action; *there* without doubt the Possessor had got the Freehold, though by Wrong.)

All the Law concerning Disseisins, which is any way applicable to the present Inquiry, existed, and was in Use and Practice, *before* the Assize of Novel Disseisin. The *Assize* was introduced, (probably from the Usage of *Normandy*, for the Grand Coustumier treats of Assizes,) in or before the Reign of *Henry* the 2d. *Glanville*, who wrote in that Reign, calls the great Assize a Benefit *Clementiam Principis, de Consilio Procerum, Populis indultam*:" And the * *Myrrour* fo. 93. says "*Glanville* introduced it."

* C. 2. § 25. pa. 150. Edit. 1642.

Seisin is a technical Term, to denote the Completion of that Investiture, by which the Tenant was admitted into the Tenure; and without which, no Freehold could be constituted or pass. *Sciendum est Feudum, sine Investitura, nullo modo constitui posse. Feud. Lib. 1. Tit. 25. Lib. 2. Tit. 1. 2 Craig. Lib. 2. Tit. 2.*

DISSEISIN therefore must mean some Way or other turning the Tenant *out of* his Tenure, and *usurping* his Place and Feudal Relation. At the Time I speak of, No Tenant could alien *without Licence of the Lord*. When the Lord consented, the only Form of Conveyance, was by Feoffment publicly made, *coram paribus Curia*, with the *Lord's Concurrence*. Homage, or Fealty, was solemnly sworn; And Suit of Court and Services were frequently done.

The Freeholder represented the whole Fee, did the Duty to the Lord, and defended the whole Fee against Strangers.

The Freehold *never* could be in *Abeyance*; because the Lord must never be at a Loss to know upon whom to call, as his Tenant; nor a Stranger, at a Loss to know against whom to bring his *Præcipe*.

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cipe. From the Necessity of there being always a *visible* Tenant * P. 108. of the Freehold, and the Notoriety *who* acted, and did Suit and Service *as such*, many Privileges were allowed to innocent Persons deriving Title from the Freeholder *de facto*.

If the *Disseisor* died; after one Year's Nonclaim, the Descent to his Heir gave him the *Right of Possession*, and took away the true Owner's *Entry*. The Stat. of 32 H. 8. c. 33. requires 5 Years Nonclaim. The Feoffee of a Disseisor acquired Title of Possession, at the Time I speak of, by one Year's Non-claim. The Descent to his Heir remains privileged as it was at Common Law: For the 32 H. 8. c. 33. extends not to any Feoffee of the Disseisor, immediate or mediate. *Co. Lit.* 256. a. The Feoffee of a Disseisor was favoured; because he came innocently in to the Tenure, by a solemn and public Investiture, with the *Lord's Concurrence*.

But the Statute * "*Quia Emptores Terrarum*," (which took * 18 E. 1. away Subinfeudations, and gave free Liberty of Alienation to the Tenants of Subjects, and to those who held of the King, as of an Honor or Manor;) and other Statutes which extended the Power of Alienation to the King's Tenant *in Capite*; The frequent Releases of Feudal Services; The Statutes of Uses, and of Wills; and, at last, the total † Abolition of all military Tenures; have left us † V. 12 C. little but the Names of *Feoffment*, *Seisin*, *Tenure*, and *Freeholder*; c. 23. and without any precise Knowledge of the *thing originally signified* by 13 C. 2. c. 7. these sounds: The Idea modern Times annex to *Freehold*, or *Freeholder*, is taken merely from the *Duration* of the Estate.

Copyholds, and the *customary Freeholds* in the North, retain faint Traces in Imitation of the old System of Feudal Tenures. It is obvious how a Man may visibly be the Copyholder, or customary Freeholder *de facto*, in Prejudice of the rightful Tenant. It is obvious too, that *Usurping* such Copyhold or Customary Tenure, is a different Fact, from a *naked Possession*, or Occupation of the *Land*.

But, whoever will look into the Practice of *other* Countries, where Tenures subsist with all the Solemnities of Feoffments and Seisins, upon every Change of a Tenant by Descent or Alienation, and upon every Usurpation of the Real Right; will easily comprehend, that at the time I speak of, it might be as notorious *who was the Feudal Tenant de facto*, as who is now *de facto* Incumbent of a Living, or Mayor of a Corporation.

DISSEISIN was a complicated Fact, and differed from *Dispossession*. The *Freeholder by Disseisin*, differed from a *Possessor by Wrong*. *Bracton* || c. 2. *De Assisa Novae Disseysinae*, fo. 160. puts many Cases || V. Lib. 4. of Possession wrongfully taken, which he calls *Intrusion*; because c. 1, 2.

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* P. 109. there is no Disseisin: "Possessio quæ nuda est omnino, & sine aliquo Vestimento; quæ dicitur Intrusio." *Vestimento* is Seisin, Investiture; (from whence, the Saxon Term Vest;) a Metaphor, the Feudists took from Clothing: By which, they meant to intimate, "that the *naked Possession* was clothed with *Solemnities of the Feudal Tenure*." A particular Tenant, according to Feudal Notions, was *in* as of the *Seisin of the Fee*, of which his Estate was a Part. If he aliened the Fee, (which he could only do by solemn Feoffment, with the Concurrence of the Lord of whom the Fee was held,) He forfeited his particular Estate, for having betrayed his *Seisin* with which he was intrusted: But on Account of the *Privity* and *Confidence* between him and the Reversioner; and the *notorious Solemnity* of the Act of Investiture, His Feoffment DISSEISED the Reversioner.

Bracton who wrote in the Reign of Hen. 3. (before Tenants could alien without Licence,) mentions the *Disseisin* in this Case, as a *necessary Consequence*, and as a thing which *could not possibly be otherwise*; c. 3. *De Assisa Novæ Dissesinæ*, 161. b. "Item facit quis Disseisinam, cum Quis in Seysina fuerit ut de libero Tenemento & ad Vitam, vel ad Terminum Annorum, vel nomine custodiæ, vel aliquo alio modo; ALIUM feoffaverit, in PRAEJUDICIUM VERI Domini, & fecerit ALTERI liberum Tenementum; CUM DUO SIMUL ET SEMUL, de eodem Tenemento & in solidum, esse non possunt in Seysina." He considers it as impossible for the true Tenant not to be put out, when the other actually came into his Place.

So late as the 32d of Eliz. in the Case of *Matheson v. Trot*, 1 Leon. 209. The Distinction upon which the Judgment turns is "That *Henry Denny* gained a *wrongful Possession in Fee*; but did not gain any SEISIN; so no Disseisor: Therefore the Descent to his Heir is not privileged."

No-Body can disseise the King; neither can any One be disseised to the Use of the King. The King may be wrongfully *dispossessed*: But the Intruder's injurious Possession is *sine aliquo Vestimento*, and called *Intrusion*. The King cannot be made a Disseisor; not because it is wrong; (for He may, in Fact, withhold the Possession of Land from a Subject contrary to Right:) But the Reason seems, according to the Feudal System, to be this; A Subject never could stand in the King's *Seisin* or *Tenure*; and the King never could be in the *Seisin*, *Tenure*, or *Feudal Relation* of a Subject. By that Policy, all Real Property was held, mediately, or immediately, of the King: In the King himself, All real Property was *allodial*.

The

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The precise Definition of what constituted a Disseisin which * P. 110. made the Disseisor the Tenant to the Demandant's *Præcipe*, though the Right Owner's Entry was not taken away, was *once* well known; But it is not *now* to be found. The more We read, unless We are very careful to distinguish, the more We shall be confounded. For, *after* the Affize of *Novel Disseisin* was introduced, the Legislature, by many Acts of Parliament, and the Courts of Law, by liberal Constructions in Furtherance of Justice, *extended* this Remedy, for the sake of the Owner, to *every* Trespass or Injury done to his real Property; if, by bringing his Affize, He thought fit to *admit* himself disseised.

It lay against Advisers, Aiders, or Abettors, who were not Tenants. *Co. Lit.* 180. *b.* It lay against the Tenant who was no Disseisor; as the Heir of a Disseisor, or his Feoffee. *Stat. Gloucester.* It lay for the Owner, against the Disseisor of the Disseisor. The Tenant's not being ready to pay a Rent Sock when demanded, was, for the Benefit of the Owner's Remedy, a Disseisin. *Lit.* § 233. It lay for outrageous Distress. 2 *Inst.* 412. It lay against Guardian, or particular Tenant who made a Feoffment, as well as against their Feoffees. 2 *Inst.* 413. The Stat. of *Westm.* 2. *c.* 25. extends it to a Man's Depasturing the Ground of another; or taking Fish in his Fishery. If One receives my Rent without my Consent, I may elect to make him a Disseisor. *Style* 407. If a Guardian assigns Dower to a Woman not Dowable; the Owner may elect to make her a Disseisoress. 24 *Ed.* 3. 43. (cited in *Cro. Car.* 203.) In a Word; For the sake of the Remedy, as between the true Owner and the Wrong-doer, to punish the wrong; And, as between the true Owner and naked Possessor, to try the Title; The Affize was *extended* to almost every Case of Obstruction to an Owner's full Enjoyment of Lands Tenements or Hereditaments.

The Reports of Affize can only relate to Cases, where the Owner *admits* himself disseised.

The Law-Books treat of Disseisin, with a View to the *Affize*; which was the common Method of trying Titles, till Ejectment came in Use.

Littleton, who wrote long after the Remedy by Affize was enlarged by Statutes and by an equitable Latitude of Construction, speaks of Disseisins principally as between the Owner and Trespasser or Possessor, with an Eye to the Remedy by *Affize*.

These are the common Places from whence many Descriptions have been cited of a DISSEISIN. But such Authorities can give little

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* P. 111. little Light to the *present* Question, which depends upon the Nature of *such* a Disseisin as made the Disseisor Tenant to every Demandant, and Freeholder *de facto*, IN SPITE of the true Owner. Yet the Definitions in the Books, (though very imperfect,) favour often of that which originally was an actual Disseisin, *in spite* of the Owner.

Littleton, in § 279. defines Disseisin, with an *Et c.*: “Where a Man enters into Lands or Tenements (where his Entry is not congeable,) and ousteth him which hath the Freehold, *Et c.*”—The Comment says, “Every Entry is no Disseisin, unless there be an Ouster of the Freehold.” And *Co. Lit.* 153. *b.* says, “Disseisin is putting a Man out of Seisin, and ever implies a Wrong: But Dispossession or Ejection, is putting out of Possession, and may be by Right or Wrong. *Disseisin est un personal Trespass de tortious Ouster del Seisin.*”

Though the Term “DISSEISIN,” used, happens to be the same; the Thing signified by that Word, as applied to the two Cases of *actual* Disseisin, or Disseisin by Election, is very different. This Distinction of Disseisin at Election, is made in the Case of *Blunden v. Baugh*, *Cro. Car.* 303. of which Case, We have seen a Manuscript Report, fuller than the Printed One. The three Judges, with whom agreed the four Judges of the Common Pleas, argued and held “That the Lessee for Years of the Tenant at Will, was a Disseisor at the Election of the Original Lessor, for the sake of his Remedy; but never could be looked upon as the Freeholder, or a Disseisor *in spite* of the Owner, or with regard to third Persons.” The Manuscript Report says, if a *Præcipe* was brought against him, he might say “I am not Tenant to the Freehold.” A Variety of like Cases are put in *Cro. Car.*; (to which I refer—) In the Manuscript Report, there are more.

When the easy specific Remedy was by *Affize*, where the Entry was not taken away, the injured Owner might, for his Benefit, elect to consider the Wrong as a *Disseisin*. So, since an *Ejection* is become the easy specific Remedy, He may elect to call the Wrong a *Dispossession*.

Where an *Ejection* is brought, there can be *no Disseisin*; because the Plaintiff may lay his Demise when his Title accrued, and recover the *Profits* from the Time of the Demise. The Entry confessed is previous to making the Lease: But there is *no* real or supposed *Re-Entry*, after the Ejection complained of. If it was considered as a Disseisin, No *mesne Profits* could be recovered without an *actual* Re-Entry.

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If the Lessee for Life, or Years, makes a Feoffment, the Lessor * P. 112. may still distrain for the Rent; or charge the Person to whom it is paid, as a Receiver; or bring an Ejectment; and *choose* whether he will be considered *as disseised*. *Metcalf on the Demise of Kynaston v. Parry and others*; A Case reserved at Salop Assizes 25th March 1742, for the Opinion of the Court of Exchequer; (who gave Judgment in it, on the 24th of November 1743,) was this. Tenant in Tail, of Lands leased by his Father, to a Second Son, for Lives, (under a Power,) upon his Father's Death received the Rent from the Occupier, as Owner and as if no such Lease had been made, during his whole Life. He suffered a Common Recovery. It was holden "That this was only a Disseisin of the Freehold at Election; and that therefore He could *not* make a good Tenant to the " *Præcipe*:" And the Recovery was adjudged *bad*.

Except the Special Case of Fines with Proclamations, (which stands entirely upon distinct Grounds,) and the Construction of the Stat. of 4 H. 7. c. 24. for the sake of the Bar; I cannot think of a Case, where the true Owner, whose Entry is not taken away, may *not* elect, (by pursuing a possessory Remedy,) to be deemed as *not* having been *disseised*.

The Consequences of *actual* Disseisins, considered *as such*, continue Law to this Day. The Disseisee cannot dispose, or devise: The Descent takes away his Entry. There are two Cases cited in the Case of *Blunden v. Baugh*, material to this Point. *Poussy v. Blackman*, B. R. Trin. 18 Jac. Rot. 1230. *Palmer* 201. which is more fully stated in the Manuscript Report, than in * *Croke*. The Case (in Effect and Operation) was this. Tenant at Will made a Lease for Years: The Original Lessor devised. Though the Lease by Tenant at Will, at the Election of the Original Lessor was a *Disseisin*, Yet they adjudged his Devise good; because he had *not elected* to admit himself disseised; and, by making a Will, intimated the *Contrary*.

Another Case, (not in the Report in *Cro. Jac.* but cited in the Manuscript,) was in the 14th of Eliz. Sir *Ambrose Cone*, of his own head, entered into Lands of Sir *William Hollis*; and paid Sir *William*, afterwards, a certain Rent, claiming to hold as Tenant at Will; and died. His Heir entered: Upon whom, Sir *William* entered. It was adjudged "That at the Election of Sir *William* " Sir *Ambrose* was a Disseisor: But as Sir *William* had not determined his Election before the Death of Sir *Ambrose*, and entered " upon his Heir, it was *no Disseisin*; and consequently, the Descent no Bar to his Entry."

In

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* P. 113. * In the Case of *Pousley v. Blackman*, *Palmer* 205, It is said, "If a Disseisee devise, and afterwards enter; the Devise is good:" Which *Dodderidge* denied, and said there must be a new Publication. Which seems right, if there ever was a Disseisin: For, where an actual Entry is necessary, it will not make good a Conveyance made before; as was holden in *B. R. & Dom. proc.* in the Case of * *Berrington v. Parkhurst*. The actual Entry could not support the Lease made before. Yet in † *Salk.* 237. It is agreed, "the Devise is good, because he was seised *ab initio*, so as he might bring Trespass:" i. e. He never was disseised at all, by his Election; and he might make that Election, without an Entry; He might bring his Ejectment, he might bring Trespass, without a Re-Entry. If it was not for this Doctrine of Election, what a Condition would Men be in!

* May 1738.
† *Salk.* 237.
Bunter v.
Coke.

In the Case of *Pousley v. Blackman*, there was no Entry: And after much Argument, it was at last resolved unanimously by the whole Court, from the Inconveniences which would be introduced if a Lessee by a secret Contract with a Stranger could defeat the Will of his Lessor, "That the Devise was good." And in the Manuscript Report where it is cited, One Point said to have been resolved, is "That the Owner, by making a Devise, shewed his ELECTION, NOT to be disseised."

I will now consider Whether *James Earle* can be deemed a good Tenant of the Freehold by Disseisin.

DISSEISIN is a Fact. It is not found: All the Jury say, is "That soon after the Judgment in Ejectment, Sir Robert entered and was in Possession." This must be taken to be an Entry in consequence of the Judgment—It was so considered upon settling the Special Verdict: Otherwise the Defendants have no Case; For it is not found, That Lady *Atkyns* was ever ousted, or quitted the Possession, or that Sir Robert ever was seised.

Taking Possession, under a Judgment in Ejectment, never could be a Disseisin of the Freehold.

Suppose it a real Proceeding—The Termor of a Disseisee might, at the old Law, recover against the Disseisor: He might recover against the Feoffee of his Lessor. But he never could thereby become a Disseisor of the Freehold: He never could be other than a Termor, enjoying, in the Nature of a Bailiff, by Virtue of a real Covenant. In respect of the Freehold, his Possession enured always by Right, and never by Wrong. If the Lessor had infeoffed, it enured to the Alienee; If the Lessor was disseised and might enter, It

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It enured to the *Disseisee*; if his Entry was taken away, it enured * P. 114. to the *Heir or Feoffee of the Disseisor*, who in *that* Case had the Right of Possession.

Suppose the Proceeding (as it is) a *fictional* Remedy. Then in Truth and Substance, a Judgment in Ejectment is a Recovery of the *Possession*, (not of the *Seisin* or *Freehold*,) without Prejudice to the *Right*, as it may afterwards appear, even between the Parties. He who enters under it, in Truth and Substance can only be *possessed according to Right*, *prout Lex postulat*.

If He has a Freehold, He is in as Freeholder. If he has a Chattel-Interest, He is in as a Termor; and in respect of the Freehold, his Possession enures *according to Right*. If he has no Title, He is in as a Trespasser; and, without any Re-Entry by the true Owner, is liable to account for the Profits.

It is found, That the Ejectment was brought by Sir Robert Atkyns, to recover the *Possession*: But it is not found, that he claimed the *Freehold*.

The Title must *now* be taken as in *this Special Verdict*. Therefore it appears he had *no Right* to the *Possession*. His *Feoffee* could be in no other Condition than *himself*: He had a Possession, without Prejudice to the *Right*; and could convey *no other*. He was not in as a particular Tenant;—There was no Privity of any Seisin;—He had only a *naked Possession*.

But the Case is still stronger. The true Owner cannot even elect to make a Person in Possession *under a Judgment in Ejectment*, a DISSEISOR. He could not bring an Affize of *Novel Disseisin*: The Entry is *not injuste & sine Judicio*; but *under* Authority of a Court of Justice, and *lawful*; therefore not liable to Punishment by Fine, (as every Disseisin was.)

The true Owner may enter upon a Disseisor: But after a Judgment in Ejectment, an actual Entry would not be permitted. If there *had* been any Election in this Case; the true Owner elected "*not to be disseised*," and recovered by Ejectment: Which, if there had been a Disseisin, would have purged it.

But there is still behind, (though it happens not to be necessary,) a *larger Ground*, upon which to determine this Question; and more satisfactory, because more intelligible; from the *Nature of a Common Recovery now*, and a Feoffment to make a Tenant to the *Præcipe*, with *that View only*.

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* P. 115. The Sense of wise Men, and the general Bent of the People in this Country, have ever been against making Land perpetually unalienable. The Utility of the *End* was thought to justify any *Means* to attain it.

Nothing could be more agreeable to the *Law of Tenures*, than a Male Fee unalienable. But this Bent "to set Property free" allowed the Donee, *after* a Son was born, to destroy the Limitation, and break the Condition of his Investiture.

No sooner had the *Statute de Donis* repeated what the Law of Tenures said before, "that the Tenor of the Grant should be observed;" than the same Bent permitted Tenant in Tail of the Freehold and Inheritance, to make an Alienation, *voidable* only, under the Name of a *Discontinuance*. But *this* was a small Relief.

At last, the People having groaned for 200 Years under the Inconveniences of so much Property being unalienable; and the Great Men, to raise the Pride of their Families, and (in those turbulent Times) to preserve their Estates from Forfeitures, preventing any Alteration by the *Legislature*;—The same Bent threw out a * *Fiction*, in *Taltarum's Case*; by which, Tenant in Tail of the Freehold and Inheritance, or with Consent of the Freeholder, might alien absolutely.

* Pigott, of
Common Recoveries, pa.
7, 8, 9, 10.

Public Utility adopted and gave a Sanction to the Doctrine; for the *real* political Reason, "to break Entails:" But the *ostensible* Reason, "from the fictitious *Recompence*," hampered succeeding Times, how to distinguish Cases which were within the false Reason given, but not within the real Policy of the Invention. "Till, at last, the *Legislature* applauded Common Recoveries, and *lent their Aid* by the Acts of 11 H. 7. c. 20. 33 H. 8. c. 31. 34 & 35 H. 8. c. 20. 14 Eliz. c. 8. and lately 14 G. 2. c. 20: (Which is a retrospective and declaratory Law, and seems to have restored the Original Tenant to the *Præcipe*.) Before the Statute of *Quia Emptores terrarum*, *Subinfeudations* whereupon Rents and Services were reserved, did not prevent the *Præcipe's* lying against the Freeholder of the Seignory. When common Leases to Farmers, for One or more Life or Lives, reserving Rent, came in Use; They, for that Purpose, *resembled Subinfeudations*, and ought not to prevent the *Præcipe* being brought against the Owner of the Freehold, under which such Leases were granted.

As the *Legislature* has, for Ages, *avowed* the Proposition; We may now say "that Common Recoveries are a mere *Form of Conveyance*."

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* "*veyance*." All necessary Circumstances of Form and Ceremony * P. 116.
are taken from it's fictitious Original.

The Policy of *this Species* of Alienation meant to take a *middle* Way as to Entails, between Perpetuities and absolute Property.

Alienations were *allowed*; yet in such a Shape as necessarily required *Deliberation* and *Delay*: And they were only allowed to be made by Tenant in Tail in *Possession*; or by Tenant in Tail in Remainder, *with Consent* of the Owner of the first Estate for Life. The Eldest Son was restrained in the Life-time of his Father, or Mother, or any other Ancestor or Relation, seized for Life, under a Family Settlement.

The Act of 14 G. 2. proceeds, upon the Parties to a Recovery having *Power to suffer it*. Sir Robert Atkyns the Son had *no* Right to suffer a Common Recovery, without the *Concurrence* of the Jointress. Any Contrivance to do it *without* her Joining, is Artifice and Evasion.

If Tenant in Tail in Possession is disseised; though the *Præcipe* be brought against the Disseisor, yet, if *he* is vouched, the Recovery shall bar; Because *he* had *Power to Bar*.

In *Lincoln College Case*, 3 Co. 59. The Judges support the Collateral Warranty of *Sibil*; because She and *Edward* had *Power to bar*.

In *Jenning's Case*, 10 Co. 44. The Recovery is supported, because the Parties had *Power*.

By Parity of Reason, *this* Recovery ought *not* to be supported, because the Parties had *no* Power: If it was; the Law must be overturned.

Every Remainder-Man in Tail might easily get a *naked* Possession, and make a *secret Feoffment*.

The Plan of Marriage and other Family Settlements, is "to limit a Remainder to the first, and every other Son in Tail." The *Negative* which the Father now has upon the eldest Son's suffering a Common Recovery, is the very *Means* and *Consideration* of getting the Estate re-settled, upon the Marriage of the Eldest Son. By *this* Method, the Moment he attains to the Age of 21 Years, He may set his Father at Defiance, suffer a Common Recovery, and bar all the rest of the Family. *This Consequence alone*, in a Case *unprecedented*, is a sufficient Objection.

When

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*P. 117. When a Termor, after the 4th of H. 7th, made a Feoffment, and levied a Fine with Proclamations, and insisted upon 5 Years Non Claim, the Judges, with strong Sense, said, though a Feoffment by Tenant for Life, or Years, or at Will, is a Disseisin; It shall *not* operate as a Disseisin, to enable the *Termor Himself* to bar the Inheritance, by a Fine with Proclamations according to the 4 H. 7. c. 20. For, say they, "It was never the Intent of the Makers of the Act, that those who could not levy a Fine, should by making an Estate *by Wrong and Fraud*, be enabled to bar those who had Right. For if they themselves, *without such fraudulent Estate* could not levy a Fine to bar them who had the freehold and Inheritance; Certainly the Makers of the 4th of H. 7. c. 20. did not intend that by making of an Estate *by Fraud and Practice*, they should have Power to bar them: And such *fraudulent Estate* is as *no Estate*, in the Judgment of the Law." So say I, in the present Case. It was never the Intent, that those *who could not suffer a Recovery*, should, by making an Estate *by Wrong and Fraud*, be enabled to bar those in Remainder or Reversion who had a Right. For if they themselves, *without such fraudulent Estate*, could not suffer a Recovery to bar those in Remainder and Reversion; Certainly, the Framers of this qualified Species of Alienation, did not intend, that by making an Estate *by Fraud and Practice*, they should have Power to bar them: And such *fraudulent Estate* is as *no Estate*, in the Judgment of the Law.

The Judges then put many Cases, where a Recovery in Dower, or other real Action; a Remitter to a Feme Covert, or an Infant; a Warranty; a Sale in Market Overt; the King's Letters Patent; a Presentation; an Administration;—In short, all Acts Temporal and Ecclesiastical, shall be *avoided by Covin*: And from thence argue that a Fine which the Parties had *no Power to levy directly*, shall not be supported *indirectly* by Covin. So argue I, in the present Case: A Common Recovery which the Parties had *no Power to suffer directly*, shall *not* be made good *by Wrong and Fraud*.

In the Spirit of the Makers of the 14 G. 2, I say the Parties to this Recovery had *not* Power to suffer it: *Therefore it is substantially bad*.

This is *not* the Case of a Feoffment to a *third* Person, for *his own* Benefit: It is, in Effect, to the Use of Sir Robert, the *Wrong-Doer, himself*. The Law considers a *Feoffee to the Intent to be Tenant to the Præcipe*, as a *mere instrument for one Purpose of Form only*. His Wife shall *not* be endowed; His Statutes or Judgments shall *not* affect the Land; If he had a Term for Years, it shall *not* merge. Let me appeal then to the oldest Authorities, in those Times when the

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the Solemnity and Notoriety of Feoffments, and the Feudal Ve- * P. 118.
neration in which they were held, gave them all that wonderful
Efficacy We read of: Could a Man, by *his own injurious* Feoffment,
have acquired an Advantage to himself? *Littleton* shall answer:
He tells us what was established long before he wrote. *Lit.* § 395.
“ If a Disseisor infeoff his Father in Fee, and the Father die seised
“ of such Estate, by which the Lands descend to the Disseisor as
“ Son and Heir, &c; In this Case, the Disseisee may well enter
“ upon the Disseisor, notwithstanding the Descent: For that as to
“ the Disseisin, the Disseisor shall be adjudged in *but as a Disseisor*,
“ notwithstanding the Descent; *Quia Particeps Criminis.*”

After the Statute *De Donis*, Tenant in Tail in Remainder, with
the Concurrence of the Freeholder, might make a *voidable* Alienation,
by *Discontinuances*: But he could not acquire to himself that
Privilege, by an *injurious* Entry and Feoffment. “ He in Remain-
“ der in Tail disseises Tenant for Life, and makes a Feoffment, and
“ dies without Issue, and the Tenant for Life dies; He in Rever-
“ sion may enter: It is no Discontinuance.” *Co. Lit.* 347. a. b.
It is no Disseisin of the Reversion. “ If Remainder-Man for Life
“ disseise the immediate Tenant for Life; after the Death of the
“ immediate Tenant, he is in as Tenant for Life.” Neither should
a Reversioner, by an injurious Entry upon the Tenant for Life, be,
in respect of Strangers, allowed to transmit to his Heir the Privilege
of Descent. If the Reversioner disseises Tenant for Life, and dies
seised; the Descent shall not take away the Entry of a Stranger. *Hob.*
323.

From the Whole, We may conclude—*If, before* the Introduction
of Common Recoveries as a Conveyance, this Question had
been agitated in an *Adversary* Real Action, upon a Plea “ that
“ *Earle* was not Tenant of the Freehold;” It would have been ad-
judged, from the Law and artificial Learning of Tenures, “ that
“ He could *not* be so considered.” *If* the Question had been,
“ Whether Tenant in Tail in Remainder should, by such *injurious*
Entry and Feoffment, acquire a *Benefit to himself*, to the *Prejudice*
of his Reversioner; It would have been adjudged, from eternal Prin-
ciples of Justice, “ that an Act founded in Wrong should *not*, by
“ *Virtue of the Crime itself*, become legal, for the *Author's* Ad-
“ vantage.”

As it is *now* agitated, when Common Recoveries are established,
as a *Species of Alienation*;—The only Question is, “ Whether the
“ Rule of Law which *requires the Concurrence* of the Owner of the
“ first Estate for Life, shall be *overturned*.” ’Tis better to subvert
the Rule directly, than suffer it to be done by a *secret injurious* En-
try and Feoffment; which cannot be prevented, and which the
Owner may never hear of.

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* P. 119. * There is no Injury or Wrong, for which the Law does not provide a Remedy. But if this Stratagem should prevail, Redress must follow *too late*; unless the Entry of the Tenant for Life shall *avoid* the Recovery. If it would, there is an End of the present Question: For he Jointress entered, and was intitled to the Profits from Sir Robert Atkyns as a Trespasser *ab initio*.

In every Light, and upon every Ground of Law, this Recovery is *bad*.

As there is no Bar to the RIGHT of the Lessor of the Plaintiff—

Second General Question

The second General Question is “Whether the Lessor of the Plaintiff is, by the *Statute of Limitations*, barred from recovering “in THIS Ejectment.”

This Point was certainly not insisted upon at the Trial: And therefore the Special Verdict is not adapted to it. The abstruse Learning, upon which the Validity of the Common Recovery depended, might engross the whole Attention at the Trial: And the Special Verdict having no Facts, (which easily might have been found,) particularly applicable to an Objection from the Statute of Limitations, might occasion the Question not having been made at the Bar, till the last Argument. The Point however is certainly *open*, upon this Special Verdict.

An Ejectment is a *possessory* Remedy, and only competent where the Lessor of the Plaintiff *may enter*: Therefore it is always necessary for the Plaintiff to shew, that his Lessor had a *Right to enter*; by *proving* a Possession within 20 Years, or *accounting for the want* of it, under some of the Exceptions allowed by the Statute. *Twenty Years* adverse Possession is a *positive Title* to the Defendant: It is not a Bar to the *Action* or *Remedy* of the Plaintiff, only; but takes away his *Right of Possession*.

Every Plaintiff in Ejectment must shew a *Right of Possession*, as well as of *Property*: And therefore the Defendant needs not *plead* the Statute, as in the Case of Actions.

The Question then is, Whether it appears upon this Special Verdict, “that the Lessor of the Plaintiff *might ENTER*, when he “brought this Ejectment.”

On the 9th of November 1711, Sir Robert Atkyns died without Issue Male.

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On the 9th of October 1712, Lady Atkyns, the Jointress, died. * P. 120. Then accrued the Title of Entry of the Lessor of the Plaintiff. His only Excuse for not entering is, "That He was prevented by the said LEASE of the 31st of May 1698, to the three Dacres."—That upon the Death of Thomas Dacres the Surviving Lessee, on the 23d of July 1752, a new Title of Entry accrued: Upon which, He entered on the 15th of December 1752; and brought this Ejectment.

Three Answers are given: Any one of which, if well founded, is sufficient.

1st. That the said Lease was absolutely void, and of no Effect.

2d. If good, It determined by the Estate Tail being spent; by the express Tenor of the Demise.

3d. If subsisting, yet, upon the Extinction of the Estate Tail, It was a Trust to attend the Inheritance in the Lessor of the Plaintiff, and made part of his Title Deeds: Therefore could not stop the Statute's running, to protect an adverse Possession, nor give Him any new Right of Entry.

First. That the Lease was void.

Sir Robert Atkyns the Father, being only Tenant for Life, could, by Virtue of his Ownership, make no Estate to continue after his Death. This Lease, therefore, after his Death, can only be supported by his Power; if it was made pursuant to it.

1st Answer to the Excuse for not entering.

"Whether it was made pursuant to his Power," is the Question.

The Limitation and modifying of Estates, by Virtue of Powers, came from Equity into the Common Law, with the Statute of Uses. The Intent of Parties who gave the Power, ought to govern every Construction. He to whom it is given, has a Right to enjoy the full Exercise of it: They over whose Estate it is given, have a Right to say "It shall not be exceeded." The Conditions shall not be evaded; It shall be strictly pursued, in Form and Substance: And all Acts done under a Special Authority, not agreeable thereto, nor warranted thereby, must be void.

Of all kinds of Powers, the most frequent is that "to make Leases." For the Encouragement of Farmers, to occupy, stock, and improve the Land, It is necessary they should have some permanent Interest. Unless the Owner of the Estate for Life was enabled to make a permanent Lease, He could not enjoy to the best

Advantage,

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* P. 121. * Advantage, during his *own* Time: And they who come *after*, must suffer, by the Land being un-tenanted, out of Repair, and in a bad Condition. The Plan of this Power is for the *mutual* Advantage of Possessor and Successor. The Execution thereof is checked with many Conditions, to guard the Successor; that the Annual Revenue shall not be diminished; nor Those in Succession or Remainder, at all prejudiced in Point of Remedy, or other Circumstance of full and ample Enjoyment.

There are *two* Methods of Leasing, in common Use in this Kingdom: At the best Rent; And upon Fines; which, as the Lives or Leafes drop, are considered among the annual Profits. This Power is always adapted to *both*. It is inserted in almost every strict Settlement of every Kind. It is inserted in the Greater Deed of the 12th of *June* 1669; and given indiscriminately to Sir *Robert* the Father, Sir *Robert* the Son, and *Lovis* his Wife.

The Nature and View of a Power, so usually given, is well understood: And Courts of Justice have always looked with a jealous Eye, to see that the Conditions in Favour of the next Taker be *pursued*; not literally only, but *substantially*. It is not sufficient that the antient Rent be reserved: It must be reserved with all the *Beneficial Circumstances*. If payable before, at four, It cannot be reserved at two Payments. Lord *Mountjoy's* Case, 5 Co. 3. b. The whole Rent must be payable annually during the whole Term. In that Case, It was holden "that less could not be reserved, even to the " *Lessor* himself, during his own Life."

One of the Reasons in *Elmer's* Case, 5 Co. 2. shews the Rent must be payable annually during the Term.

In the Case of *Lady Charlotte Orby & al' v. Lady Mobun*, 2 Vernon 531, 542, Lord *Cowper*, *Holt*, and *Trevor*, All three held clearly, that a Lease "reserving the *best Rent*," though good against an Owner of the Inheritance, was *void under a Power*: And *Cowper* and *Trevor* held, That reserving "the *Ancient Rent*," where Lands had been usually demised; though good and certain enough by Reference, against an Owner of the Inheritance, was *void under a Power*; Because it put the Remainder-Man *under Difficulties* in avowing.

"The Intent was," say they, "that the Tenant for Life in Possession might lease: So it was, on the other hand, that the Revenue should not be diminished; but the ancient Rent, at least, reserved; and in *such beneficial Manner*, as might with Certainty, and without any Difficulty be recovered."

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“ The Question here is not,” say they, “ Whether the Lease is * P. 122.
“ void for Incertainty, as between the Lessor and Lessee; but whe-
“ ther *All Requisites* are observed, and *such beneficial Clauses and*
“ *Reservations* as ought to have been, for the *Benefit of a third*
“ Person, the Remainder-Man.”

In the Case of the *Earl of Cardigan v. Montague*, 6th June 1755, A Decretal Order on the Master's Report; The Duke of *Montague*, Tenant for Life, without Impeachment of Waste, had Power to lease, reserving ancient Rent where usually demised, and best Rent where not usually demised: He made 24 Leases. The Master's Report, as to many of the Leases, which He reported bad, was submitted to: As where ancient Covenants “ to grind at Mills, “ or to pay Land Tax,” were not in the new Lease;—Where some Part, not within the Power, is included in the Lease;—Where many Manors were included in the Lease, reserving a Sum certain, as the best Rent; which laid the Remainder-Man under Difficulties, to find out whether it was the best Rent or not. As to Five of them, which the Master reported to be good, Exceptions were taken. Their Validity turned upon this Case. The Words in the Power were “ Reserving ancient, usual, and accustomed “ Rents, Heriots, *Boons*, and Services.” In the former Leases, the Tenants covenanted “ to keep in repair:” That Covenant was omitted in this. The Lord Chancellor was of Opinion, that that Covenant was a *Boon*, and *beneficial to the Remainder-Man*; and held these Leases void, for Want of it. He took some Days to consider; and declared He was clear upon the Argument, but took time, because there was no Case in Point. The more He thought of it, the more he was convinced. The Principle He rested upon was, that the Estate must come to the Remainder-Man, in *as beneficial* a Manner, as ancient Owners held it.

I have gone so far at large into the General Doctrine, not from any Difficulty; but because the Point is of so much Consequence to the Lessor of the Plaintiff. For this Writing of the 31st of May 1698, has not Colour enough to make a Question.

1st. It is *no Lease* at all. The very Definition of a Lease, is a Contract between Landlord and Tenant, by which *Both* are bound in *mutual* Stipulations.

A Sale and Lease are defined to be the same Species of Contract. A Sale cannot be, unless some-body agrees to pay the Price: Nor can there be a Lease, unless some-body agrees to hire, and to pay the Rent. This Writing purports to be such a Contract. It is an *Indenture*: which implies reciprocal Instruments, tallying One with the

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* P. 123. * the Other. It *professes* being made by Sir Robert Atkyns on the One Part, and the three Dacres on the Other Part. But it is not: The Dacres are not bound; They never executed this, or any Counterpart. It does not appear they *knew* or *consented* to the Making of it.

Livery of Seisin was immaterial. A Lease by Virtue of a Power, takes Effect out of the Settlement that gives the Power. But John Dacres, who gave the Letter of Attorney to take Livery, died in 1705. Robert died in 1706. Sir Robert Atkyns, the Father, lived till 1709. Suppose, at his Death, 360*l.* a Year a beneficial Rent: Those in Remainder could not demand it. Thomas Dacres had not executed the Lease; He had not accepted it; He never had entered under it: No Distress could be taken from him; No Action could be brought against him.

One Man cannot oblige another to be his Tenant, at a high Rent, without his Consent. This is so plain, that on the Part of the Plaintiff, they have argued that Thomas Dacres was bound by Acceptance; 3 Ways—

1st. Because Livery of Seisin was taken in the Name of John Robert and Thomas.

Answer. THOMAS gave no Authority so to do: It does not appear that he knew of it. But the mere Taking Livery of Seisin, if he never entered or occupied, would not be sufficient to charge him with the Rent reserved.

2d. In the Ejectment brought in Hilary Term 1711, a Demise was laid from Thomas Dacres, as well as the Jointress: And the Plaintiff had Judgment to recover “*Separales Terminos.*”

Answer. The two Titles are inconsistent: So there could not be really a Recovery upon both. But the Judgment pursued the Declaration; and was mere Form. It does not appear that Thomas Dacres knew his Name was made Use of: And He never entered, or took Possession.

3d. That Acceptance shall be presumed. And it is compared to Grants: and *Thompson v. Leach* is cited. [V. 3 Lev. 284.]

Answer. The Ground of *Thompson v. Leach*, and of All the Cases there put, is, “That a Gift imports a Benefit: and Consent to receive “a BOUNTY may fairly be presumed, till the contrary appear.” But the Offer of Lands to a substantial Man at a Rack Rent, does not import such a Benefit, as No-body in his Senses could refuse. And here, there is no Room to presume: For the Contrary appears. Tho-
mas

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* *mas Dacres dissented*, during his whole Life; and never took Possession. * P. 124.
tion. The Contrary appears too, from the *Writing itself*. It never was the *Intent*, that the *Dacres* should take Possession or pay Rent. It was to be a Conveyance only of the *Ideal Freehold*: Which might Non-suit the Remainder-Man, in Case he brought an Ejectment against third Persons; or prevent his suffering a Recovery; but never could be any Security to him for his *Rent*.

It is immaterial, whether an Owner of the Inheritance could convey an *Ideal Freehold*, to delay the Tenant in Tail, claiming under his Grant, from suffering a Recovery.

The Question *here* is, Whether it be that *usual Husbandry Lease*, reserving a *Rack Rent*, which is *intended* by every Power of Leasing.

It is very clear that *None of the Lessees were bound* by this Writing; more especially, that *Thomas Dacres* was not. But I go further: Sir *Robert Atkyns*, the nominal Lessor, was *not bound* by it. The *Deed* never was out of his *own Possession*. The declared Intent proves it a *Trust for Sir Robert himself*. His Will, under which the Lessor of the Plaintiff claims, avers it to be a *Trust*, and devises it *as such*.

It is no Objection to a Lease under a Power, "That it is in *Trust for him who executes the Power*:" PROVIDED the *legal Tenant be bound*, during the Term, in all requisite Covenants and Conditions. But here, at the Death of Sir *Robert* the Father, Those in Remainder had *no Tenant* to resort to: and the nominal Tenant never did in Fact enter, nor could either in Law or Equity, ever have been *compelled to enter*, or pay One Farthing *Rent*. So that this Writing, calling itself an Indenture, and purporting to be a Contract, is Waste Paper only, by which *No-body ever was bound*.

BUT suppose it had been executed by the 3 *Dacres*; It could not be supported as a Lease *within the Meaning of the Power*; upon a Variety of plain Objections, in respect of the *Premises*, the *Rent*, and the *Remedy*.

1st. As to the *Premises Demised*—It comprizes too much; and lays the Remainder-Man under Difficulties to know whether the best Rent is reserved. It extends to Things out of which no Rents can be reserved; as Tithes, Rents of Assize, Rents of Customary Tenants, Commons, Feedings, and Lands in the several Tenures of particular Persons.

The Condition of the Power is, That there should be no Term exceeding 3 Lives in Being at the same Time: Yet the Demise extends to all and every the Rents reserved upon *any Leases or Grants*.

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* P. 125. 2dly. As to the *Rent reserved*—The Power requires “The *best* “Rent that can be reasonably got, to be reserved *payable during* “the Term.”

There is *no Covenant for Payment*. Under a mere Reservation, it could not be payable *till Entry*: And therefore, in Fact, might *never* be payable, *during* the Term. It is not found “to be the “*best* Rent.”

3dly. As to the *Remedy*—There being *no Covenant to pay* the Rent, the Lease might be assigned to a Succession of Beggars. There being *no Clause of Re-Entry*, the Ground might lie unoccupied without any, or not sufficient Distress upon it: So that the Remainder-Man could neither have his Rent nor his Land. There is *no Counterpart*; an unusual Omission, and very prejudicial.

Therefore the Lease could *not* have been supported, *if it had been executed by the 3 Dacres*: Which is *not* the Case.

Every fraudulent, unfair, prejudicial Execution of such a Power, in respect of *those in Remainder*, is *void* at Law.

If the Lease be a void Execution of the Power, against ALL *claiming under the Settlement*, It cannot be made good against the *Reversion in Fee*, whereof Sir Robert Atkyns the Father was seised, either by Virtue of the Livery, or by way of Estoppel, supposing the 3 Dacres to have executed: Because an *Interest* would have passed, during the Life of Sir Robert Atkyns the Father; and there is no *Estoppel* where any *Interest* passes; and, to make it operate by *Virtue of the Livery, out of the Reversion in Fee*, would be *contrary to the whole Intent* of the Deed plainly expressed. Which brings Me to a second Answer given.

2d Answer to the Excuse for not entering. 2d Answer. Suppose this Pocket undelivered Grant of the Ideal incorporeal Freehold, a good Execution of the Power; They have argued that it DETERMINED *with the Estate Tail*; That the *only Cause* of the Grant being “to preserve the Reversion *during* the “Estate Tail” must *qualify the Grant*, and *amount to a Limitation*; That there is *no technical* Form of Words necessary to express a Contingency, upon which an Estate for Lives may sooner determine.

The Deed might have said expressly, “If the Heirs Male of Sir “Robert Atkyns the Son continue so long;” or, “that the Lease “should determine, if, during the Lives, the Estate Tail should be “spent.” That the Intent of the Deed, *plainly expressed*, is *tantamount*.

3d Answer.

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* 3d Answer. Suppose it to subsist;—It is as a *Trust*, and devised * P. 126.
as such, to *attend the Inheritance* of the Lessor of the Plaintiff; which came into Possession the 9th of *October* 1712: His Title and Right of Entry *then* accrued. 3d Answer to the Excuse for not entering.

This Lease was One of his Muniments; a mere Weapon in his Hands: And it would be going a great Way, to say “such a *Form*” should take from an adverse Possession the Benefit of the Statute.”

But as we are All, clear, “That at the Trial, a *Surrender* of such “a Lease might, and ought to be *presumed*, to let in the Statute “of Limitations;” The Special Verdict, here, *not having found such Surrender*, We cannot come at the Justice of the Case in *that* Shape.

It is unnecessary to go into this Point, or the former: And it would be very improper, unnecessarily to do it.

If the *Dacres* had *no Estate* by Virtue of this Demise, upon the 9th of *October* 1712, Then this Ejectment was *not* brought *within* 20 Years after the Lessor's Title accrued: And no Facts are found, to excuse him within any of the Exceptions.

Therefore We are *All* of Opinion that there should be
JUDGMENT *for the* DEFENDANTS.

A WRIT OF ERROR was brought in the House of Lords; and came on upon *Thursday* 26th *January* 1758. The Counsel agreed, and were allowed, to argue the *last Point*, for the Judgment of the House, first: Because, *if* their Lordships should be of the same Opinion with the Court of King's Bench, “That *this Ejectment* was *barred* by the Statute of Limitations,” It would be quite unnecessary to go into the *first* Question.

All the Judges were ordered to attend. To whom, after the Argument at the Bar was over, the House proposed the following Question, *viz.*

“Whether Sufficient appears by the Special Verdict in this Cause, to prevent the Lessor of the Plaintiff, by Force of the Statute of Limitations, of the 21st of King *James* the First, from Recovering in this Ejectment.

Whereupon, the Lord Chief Justice *Willes*, having conferred with the Rest of the Judges, delivered their unanimous Answer, “That Sufficient *DOES* appear by the Special Verdict in this Cause,

K k

“ to

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* P. 127. " to prevent the Lessor of the Plaintiff, by Force of the Statute of
" Limitations of the 21st of King James the First, from Recover-
" ing in this Ejectment."

Then the Judgment of the Court of King's Bench was
AFFIRMED, with 5 l. Costs.

Wednesday
26th Jan.
1757.

Green *vers.* Mayor of Durham.

Mr. Just. Wilmot *absent* (in Chancery.)

THIS Case was set down in the Crown-Paper, as a Special Verdict, and was so called; and was argued by One Counsel on each Side, in the same Manner as if it he had been a Special Verdict: But it was only a Verdict upon Six several Traverses to the Return of a *Mandamus* (on 9 *Ann. c. 20.*) directed to the Mayor of *Durham*, commanding Him to *swear* and admit *Robert Green* into the Place and Office of a Freeman of the *Company* or Fraternity of Free-Masons, &c, of the City of *Durham*.

The Right set up by *Robert Green* was his having been duly *Elected* AND ADMITTED a Freeman of the *Company*: But the Objection to his being SWORN *by the Mayor*, was, "that He had NOT
" *conformed* to certain *By-Laws* particularly specified in the Return
" and found by the Verdict."

The Return was—That *Durham* is and from Time immemorial hath been an Ancient City, &c; and also, that a Power is given by a Charter of *Tobias* then Bishop of *Durham*, (in 44 *Eliz.*) confirmed by King *James* First, to the Mayor Aldermen and COMMON COUNCIL for the Time being, or the major Part of *them*, (of *whom the MAYOR AND SIX of the Aldermen to be SEVEN,*) to make By-Laws, in the *Stead, for,* and in the Name of the *Whole* Corporate Body of the City of *Durham* and *Framwelgate*.

Then the Return set forth, that certain By-Laws were *duly made* by the Mayor Aldermen and COMMONALTY, in due Manner met and assembled at the Guildhall, &c, on 8th *November 1728*. And it particularly sets forth and specifies three several By-Laws, as having been then there *made* BY THEM; to wit—

1st By-Law. That for the effectual preventing all Persons being made free, that have not a Right or Title to their Freedom in the said City, and for the better regulating of the same, The Mayor, One or more Alderman or Aldermen of the said City, and the Wardens and Stewards of the several and respective Companies for the Time being,

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* being SHALL, *from henceforth* MEET at the Guildhall or Toll- * P. 128.
booth in the said City, *four Times* in every Year, *viz.* on the first
Monday after *Martin-mas*, the first Monday after *Candle-mas*, the first
Monday after *May-day*, and the first Monday after *Lam-mas*. And
Every Person that is hereafter to be admitted a Freeman of the said
CITY and BOROUGH of *Framwelgate*, shall be THEN AND THERE
CALLED, at *Three* of the said several Meetings, BEFORE *such his*
Admittance to be a Freeman; AND *to be* APPROVED *of by* the said
Mayor and One or more Alderman or Aldermen, and the Wardens
and Stewards of the several and respective Company or Fraternity
(for the Time being) whereof He or they is or are to be made
and admitted a Freeman or Freeman respectively, or the Majority
of the said Mayor Alderman or Aldermen and Wardens of such re-
spective Company then and there present.

That any *Warden Steward* or other Freeman that shall MAKE ^{2d By-Law}
any Person a *Freeman* of the said City or of any Company therein,
contrary to the said last Ordinance or By-Law above-mentioned,
shall respectively FORFEIT and pay the Sum of 30 *l.* to the Mayor
Aldermen and Commonalty of the said City of *Durham*, to be by
them recovered by Action, or Distress of the Offender's Goods, or
otherwise, and to be paid into the Chest or Hutch, for the Use of
the said Mayor Aldermen and Commonalty, to defray any public
Expence that may happen to the said Corporation or Fraternity.

That in Case the Mayor of the said City for the Time being ^{3d By-Law}
shall swear any Person that has not actually served Seven Years as an
Apprentice with a Freeman of one of the said Companies or Fra-
ternities belonging to or used in the said City, or shall not be *justly*
intituled to the same by ancient Usage or Custom within the said
City, He shall forfeit and pay the sum of 30 *l.*: Which said Sum
shall be recovered &c, *ut supra*, and to be paid *ut supra*.

All which said several Ordinances and By-Laws the Return al-
leges to have, ever since the Making thereof, been constantly ob-
served and kept &c, and to be still in their *full Force and Virtue*, &c.

That *Robert Green* was NOT *elected* and admitted a Freeman of
the said COMPANY of Free Masons, Rough Masons, Wallers, Pa-
viours, Plaisterers, Slaters and Bricklayers.

That *Robert Green* was never duly called to be a Freeman of the said
City of *Durham* and *Framwelgate*, nor EVER APPROVED *of by the*
Mayor and one or more Alderman or Aldermen of the City of *Dur-*
ham and *Framwelgate* aforesaid, and the Warden and Stewards of the
said Company or Fraternity of Free Masons &c, BEFORE his sup-
posed Election and Admission to be a Freeman of the said Company
OR

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* P. 129. * or Fraternity, according to the first Ordinance or By-Law above mentioned, as he ought to have been.

And for *these Reasons* the said Mayor has not sworn and admitted him, nor administered the Oaths to him usually taken for the due Execution of the said Office.

Upon this Return, *Green* takes 6 several Traverses: On which, Issues were tried.

1st Issue. That the Mayor Aldermen and Commonalty *did NOT duly meet &c*, on 8th November 1728, in Order to make By-Laws &c, *Modo & Forma &c*.

2d Issue—That they did not in due Manner *make the first* By-Law mentioned in the Return.

3d Issue—That they *did NOT* in due Manner *make the second* By-Law mentioned in the Return.

4th Issue—The *like Denial* of their *making the third* By-Law mentioned in the Return.

5th Issue—That He *was elected and admitted* a Freeman of the said Company or Fraternity of Free Masons &c, as in the Writ is alledged.

6th Issue—That he was *duly called* to be a Freeman of the said City of *Durham* and *Framwelgate* aforesaid, and *was approved* of by the Wardens and Stewards of the said Company to be a Freeman of the said City of *Durham* and *Framwelgate*.

The Jury find, As to the 1st Issue—That upon the 8th of November 1728, the then Mayor and Aldermen and Commonalty *did in due Manner meet and assemble*, at &c, in order &c, in such Manner and Form as the said Mayor by his Return hath alledged.

As to the 2d Issue—That the said Mayor Aldermen *and Commonalty* did then and there, IN DUE MANNER, make the 1st By-Law in the Return mentioned, in such Manner and Form as is therein by the said Mayor alledged.

As to the 3d Issue—That they did in *due Manner* make the 2d By-Law, in Manner and Form &c.

As to the 4th Issue—The like Finding, with regard to the 3d By-Law:

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*As to the 5th Issue—That *Green* was elected and admitted a Free- * P. 130.
man of the *Company*, as in and by the Writ is alledged: But that
BEFORE SUCH *his Admittance*, He was *not called* at any Meeting
held according to the said By-Law in the said 2d Issue mentioned,
nor approved of by the then Mayor and one or more Alderman or
Aldermen and Warden and Stewards of the said Company or Fra-
ternity, nor by a Majority of them, according to the said By-Law.

As to the 6th Issue—That the said *Robert Green* was NOT *duly*
called to be a Freeman of the said *City of Durham* and *Framwel-*
gate, and *approved of* by the Wardens and Stewards of the said
Company or Fraternity of Free Masons, Rough Masons &c, to be
a Freeman of the said *City of Durham* and *Framwelgate*.

This Case was argued on the 24th of *November* 1756, by Mr.
Ambler for the Plaintiff, and Mr. *Clayton* for the Defendant; when
the Court ordered it to stand for Judgment of the then next Term.

And Lord *Mansfield* now delivered the Resolution of the Court.

The General Question depends upon *Robert Green's Right* to the
Franchise which He claims.

The Objection to his Right arises from his not being *qualified*
according to the By-Law.

If the By-Law is good, and binding, and he appears to be an
Object of it; He is certainly not qualified, and the Mayor has re-
turned a sufficient Reason for not admitting and swearing him.

All the Objections which have been made, therefore, tend to *set*
aside the By-law; Or, if the By-Law be good, to shew that *Ro-*
bert Green's Case is *not within it*.

It has been argued that the By-Law is *void*, upon two Grounds;

1st. From *Want of Authority* to make it;

2dly. From the *Subject-Matter*.

As to the First—The Objection is, That the By-Laws are re-
turned to be made by the Mayor, Aldermen, and COMMONALTY;
whereas the Power is given to the Mayor, Aldermen, and 24
COMMON COUNCIL or the major Part of *them*; of whom, the
Mayor and Six Aldermen should be Seven.

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* P. 131. * Answer. The Power to the select Number is, "to make By-Laws in the *Stead*, for, and in the Name of the whole Corporate Body." These By-Laws *might* be made by the select Number, *acting* IN THE NAME of the whole corporate Body; and must be so intended: For the Jury find, "that they did in *due Manner* meet, and in *due Manner* make the By-Laws."

As to the Second—That the By-Law is *unreasonable* and *void*: For it is likened to the Case of the Taylors of *Ipswich*, 11 Co. 53. A By-Law "that none should work at his Trade, until he had presented himself to the Company of Taylors, and proved that he had served 7 Years as an Apprentice, and admitted by them to be a sufficient Workman."

Answer. In *that* Case, the By-Law was *against Law*: It was against the 5th of *Eliz*; and a farther Restraint than that Act had made.

But *this* By-Law is *not* against any Law—It is *not* a Restraint upon Trade; but seems a *reasonable Regulation*, to prevent Persons being unduly made Free, who are not intitled by Birthright, Service, or Purchase. It provides a Method for previously examining into the Right of those who claim to be made free.

Obj. "That there is *no Method to compel a Meeting* of the Mayor Alderman or Aldermen and the Wardens and Stewards of Companies."

Answer. This Objection extends equally to *all corporate Assemblies*, by Custom, Charter or By-Law. But there is a known Method, by *Mandamus*.

Obj. If a Person has a *Right* to be admitted a Freeman, yet unless He be *approved of* by the Mayor &c, He is not to be admitted: And there is *no Method to compel* them to *approve*.

Answer. If the Mayor &c, disapprove, without Cause, a *Mandamus* will lie, suggesting the Qualification and Right of the Person claiming to be a Freeman, and commanding the Mayor to approve and admit.

BUT Supposing the By-Law *good*, it has been argued, that this Case is *not within* it.

1st Obj. The *Mandamus* is, to admit *Green* to the Freedom of the *Company*: The By-Law relates only to the Freedom of the *City*.
Answer.

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Answer. It appears from the second By-Law, to be the *same* * P. 132. thing.

2d Obj. The By-Law prohibits indeed the Election of Persons not called, and approved &c; and subjects Disobedience to a Penalty; but does *not* make the Election *void*, and cannot transfer the Right of Election *vested* in the Electors, to the Mayor &c.

Answer. These Objections are founded upon a *Misunderstanding* of the By-Law, and a *Misconception* of the Nature of the Case. The Writ recites “ that *Green* had been duly elected and admitted “ a Freeman;” and therefore commands the Mayor to swear him— The Mayor returns the By-Law &c; and “ that *before Green's* supposed Election and Admittance (by the Company) to be a Freeman, He was not called and approved by the Mayor &c.” And the Fact found by the Jury is, “ That he was Elected and Admitted by the Company; but not called and approved by the Mayor &c.” So that it appears upon this Record, that the Intent of the By-Law was, that no Person should be elected and admitted a Freeman of the *Company*, unless He was called at the Assembly and approved &c; which was a *previous Act* to be done before the Company could elect him; the way to *prevent* the Abuse “ that “ the Company *unduly* admitted Persons to their Freedom:” And the second By-Law inflicts a *Penalty on the Company*, who should make any One free, *without* the previous Calling and Approbation; And the third By-Law inflicts a Penalty on the Mayor, who should swear any *such* Person.

The *Stating the Fact* answers both the Objections. For the By-Law makes the Appearance and Approbation a *necessary Qualification*, to the being made free by the *Company*, and a Restraint upon *them* to elect any one to his Freedom, before his conforming to the By-Law: And the Right of Election is *not transferred* to the Mayor, but *remains* where it was.

Obj. It is *Not* returned “ that there *was* any Assembly, at which “ *Green* might appear, to be called.”

Answer. It shall be *intended*,—And if in Fact there was no Assembly, *Green* might have *pleaded* it as an Excuse.

Obj. He might have been elected and admitted, *BEFORE* the *making* this By-Law.

Answer. The Jury have found, “ that He was elected and admitted: But that he was not called and approved *PURSUANT to*
I the

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* P. 133. * "*the By-Law.*" So that the By-Law *was in being*, at the Time of his Election &c.

It is to be observed, that it is *not stated*, what is the *Method* of the Company's Electing Freemen, nor any thing in the Charter concerning it. For aught that appears, the First By-Law *may be* agreeable to the ancient Usage, and *revived* by this By-Law and enforced with Penalties: But supposing it to be *introductory* of a previous Qualification, it seems to be *reasonable* and well calculated to prevent improper Persons, not intitled, being made free. It is much more reasonable than the Custom of *London*, "that no Broad Cloth should be sold, but what was brought to *Blackwell-hall* to be examined; 5 Co. 62. Yet this Custom was held good; because it was to *prevent Fraud*."

WE are of Opinion that *None* of the Objections are well founded; and therefore that the RETURN ought to be ALLOWED.

Consequently, as this was the Case of traversing a Return to a *Mandamus*, pursuant to the Statute of 9 Ann. c. 20. the Rule was taken,

That JUDGMENT be entered for the DEFENDANT.

Friday 28th,
Jan. 1757.

Goodtitle, ex dimiss. Chester, *vers.* Alker & Elmes.

Tr. 26, 27 G. 2. Rot. 590.

THIS Case was first argued on *Tuesday* the 4th of *February* 1755, when there were only 3 Judges; Mr. Just. *Wright* having (two Days before) resigned, and Mr. *Wilmot* (who was appointed to succeed Him) not being then called a Serjeant: And it was again argued, and determined, on this Day, (when Mr. Just. *Wilmot* was also absent, in the Court of Chancery.)

It was a Special Verdict in Ejectment for an *Acre* of LAND lying in the Parish of *St. Philip and Jacob* in the County of *Gloucester*. It finds, as to *One* Piece of Land, containing 14 Inches in Length, and 33 Feet in Breadth, (Parcel of the Premises;) And as to *One* Other Piece of Land, containing 3 Feet 6 Inches in Length, and 7 Feet in Breadth, (other Parcel of the Premises;) And as to *One* Other Piece of Land, containing 2 Feet in Depth and 14 Feet in Length, (other Parcel of the Premises contained in the Declaration;) That *Thomas Chester* Esq; was in 1648 seised in his Demesne as of Fee, of and in the Manor of *Barton Regis* in the County of *Gloucester*, with the Appurtenances. That the said *T. C.* Esq; being so seised, certain Articles of Agreement were, on 24th *June* 1648, made

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made between the said *Thomas Chester* and One *John Gotley* other- * P. 134.
wife *Dowle*, reciting a Presentment by the Honage, at a Court
Leet of the said Manor, holden 10th of *April* 1648, "That the
" said *John Gotley alias Dowle*, in the new Building of a House at
" *Lafford's Gate*, had encroached upon the Waste of the said *Thomas*
" *Chester* then and yet Lord of the said Manor, 14 Inches in Length
" and 33 Feet in Breadth, without his House; together with a
" Porch, without the Wall adjoining to the said House, of 3 Feet
" and an half; for the which Encroachment, the said *John Gotley*
" *alias Dowle* was by the said Jury amerced; as by the Presentment
" aforesaid, in the Rolls of the said Court, appeared;" The said
Thomas Chester and *John Gotley* thereby agreed, not only concerning
the said Amerciament, (whereof the said *Thomas Chester* thereby ac-
quitted and discharged the said *John Gotley*,) But also the said *Tho-*
mas Chester, for the Consideration thereafter mentioned, agreed to
permit and suffer the said *John Gotley* his Executors and Admini-
strators, to continue the peaceable Enjoyment of the said Ground
and Waste encroached, without his Disturbance; And also to have
Liberty to set and Place a Post in the Street &c, and 3 other Posts
&c, without any Disturbance or Trouble by him the said *Thomas*
Chester &c; for the Term of 100 Years from the Day of the Date
of the said Articles. In Consideration whereof, the said *J. G. alias*
D. for Him his Heirs Executors &c, covenanted and agreed to pay
to the said *T. C.* his Heirs or Assigns, the Sum of 6 s. 8 d. *per An-*
num yearly &c, during the said Term: In Consideration whereof,
the said *T. C.* granted and agreed to let the said Encroachment or
Encroachments to stand, for and during the said Term, without
any Disturbance &c; So as the said yearly Rent or Sum of 6 s. 8 d.
be duly paid &c, And it was further found, That the two first
Pieces of Land particularly mentioned and described in the Verdict,
are the two several Pieces of Land mentioned in the said Articles to
be encroached on by the said *John Gotley* otherwise *Dowle*; and
Parcel of the Waste, and Part of the Tenement in the Declaration
mentioned; and were so encroached and taken in by the said *J. G.*
otherwise *D.* in the building or erecting the Messuage or House
mentioned in the said Articles, some small Time before the Date
of the said Articles; and then were lying in and part of the said
Manor, and were part of a PUBLIC STREET and KING's HIGH-
WAY, called *West-Street*, in the Parish of *St. Philip and Jacob* in
the said County of *Gloucester*, and leading from the City of *London*
to the City of *Bristol*.

The Jury likewise find That the said yearly Sum of 6 s. 8 d. was
duly and constantly paid, in Pursuance of the said Articles, by the
Defendants and those whose Estate they have, to the said *Thomas*
Chester and the Successive Lords of the said Manor, (his Descendants,)
during all the said Term of 100 Years; and from the End thereof,
till Lady-Day 1750.

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Then

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* P. 135. Then they find That the *Defendants Alker and Elmes, sometimes in the Year of our Lord 1748*, erected certain *Palisadoes* before the Front of the said House, and thereby *took in and inclosed the third Piece of Land*, above particularly mentioned and described, then lying in and being part of the said Manor, and being then other part of the said *public Street and High-way*; and have kept the same so inclosed, ever since, to this Time: And that *that part of the said Street* where the said Encroachments were so made, at the several Times of the said Encroachments, contained in Breadth (including the said Encroachments) *60 Feet and no more*.

The Jury find *Thomas Chester Esq;* the Lessor of the Plaintiff, to be Heir at Law to that *Thomas Chester Esq;* deceased, who executed the Articles; and, as such, to be seised of the said Manor with the Appurtenances, as the Law requires; And that, being so seised He made the Demise to the Plaintiff: By Virtue of which Demise, He entered &c; and was ejected &c. But whether upon the whole Matter aforesaid in Form aforesaid by the said Jurors found, the said *G. A. and L. E.* are guilty of the said *Trespass and Ejectment*, AS TO the said three Pieces or Parcels of Land, Parcel &c, by them supposed to be done, or not, the said Jurors are wholly ignorant &c. and so the Verdict concludes in the ordinary Form.

Argument
for the Plain-
tiff.

The Counsel for the Plaintiff made two Questions; viz.

1st Question—Whether an Ejectment will lie for these Premises AS DESCRIBED in the Declaration.

2d Question—Whether the Defendants are at Liberty to *controvert the Title* of the Plaintiff; or are ESTOPPED from so doing.

First—It may be objected, “That no Ejectment will lie of “Land which is *part of the King’s Highway*.” But it is plainly and beyond Controversy part of the *Lord’s Soil*; though it is indeed said to be part of the *Highway*. This Highway is found to be 60 Feet wide. Therefore *if enough be left* for a public Way, the *Rest* belongs to the Lord: At least, He is *not* guilty of a *Nuisance*, if he should erect any thing upon the *Overplus Part* of it.

Now 60 Feet is much more than enough for any Highway: And the Encroachment is only from the Front of the House; *Not in the Middle of the Highway*.

The Overplus of the Soil is not vested in the Crown; but in the Owner of the Soil 2 E. 4. 9. Bro. & Fitzb. Abr. Tit. Chimin. In Tr. 13, 14 Geo. 2. C. B. and at Serjeants Inn, *Selman v. Courtney*

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Courtney (concerning giving in Evidence, a Right to a Highway,) * P. 136. It was unanimously holden "That, in Trespass, the Defendant " may justify that it was a Highway, but cannot give it in Evidence; and That the *Right to the Soil* was *not* in the Crown."

If the Highway was taken out of the Lord's Waste, the Right and Property of it is clearly in the *Lord*; And the Lord may *distrain* in it: So is 17 E. 3. 43 Pl. 31. If it was not taken out of the Waste, it belongs to the Owners of the Soil on each Side. The Case of *Selman v. Courtney* (*supra*) was so determined by all the Judges.

The Owner of the Soil may cut *down the Trees*, and may have an Action for *digging* the Soil. So is 1 Ro. Abr. 392. Pl. 2. and 1 Ro. Abr. 392. Pl. 3. Title *Chimin private*, Letter B.

In the Case of *Sir John Lade v. Sheppard*, H. 8 G. 2. B. R. The Land was the Property of the Plaintiff, who made it a Street; and the Defendant's Bridge rested upon it; and He had (by Leave of the Commissioners of Sewers) arched over the Ditch, and dug the Ground, and fixed Posts upon it. It was holden "That this " making a Street was only a Dedication of it to the Public, for the " particular Purpose of *passing and repassing*; but that the *Soil* belonged to the OWNER." V. 2 Strange 1004. S. C.

The General Question is "Whether a *Part of a HIGHWAY* be " recoverable in an *Ejectment*."

The Description of a Highway is laid down in *Co. Lit.* 56. a. The *Property* of the Soil of the Highway (as has been already proved) is in the *Lord of the Soil*. An Action of Trespass must be founded on *Possession*: And an Ejectment is an Action of Trespass. In *Cro. Eliz.* 339. *Jordan v. Cleabourne*—per *Popham* and *Gawdy*, It was holden to be but a personal Action, and a Trespass in its Nature. Therefore the Plaintiff might be *possessed* of it; and consequently may *recover Possession* of it, in an Ejectment; For if he has a *Right* to the Possession, he *must* have a *Remedy* for it.

It is not *every* Encroachment, that is a Nuisance to the *Public*: Some Encroachments may stand. *Fitzb. Abr.* 77. a. N^o 447. 8 E. 3. is one Instance of it. But there, the *King* must be intended to be the *Owner* of the Soil: Otherwise, the Rent would have belonged to the Owner of the Soil; not to the King.

The Sheriff may deliver full Seisin of the Thing here demanded. In Proof of which, they mentioned a Note of a Case before Lord Ch. Baron Pengelly, in *Wiltshire*; where an Ejectment was brought
for

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* P. 137. * for a *Cottage in the Highway*; And it was objected "That it would not lie, *because* the Sheriff could not deliver Possession:" But Ld. Ch. B. *Pengelly* over-ruled the Objection; and said that Mr. Justice *John Powell* had been of that Opinion which Himself then went upon, and had done the like.

They insisted very strongly, that the Sheriff CAN give Seisin of the Thing; SUBJECT TO *the Rights* of others, upon this Property, for particular *Easements*. *Co. Litt. 4. a. Cro. Eliz. 421. Welden v. Bridgewater. Co. Litt. 48. b.* For the Rights of others are *not* to the POSSESSION; but to *mere EASEMENTS*, which are *collateral* to the Thing itself. *Cro. Jac. 263. Sir William Wrey v. Vesper.* And there is no Reason for making any Difference between *public* and *private* Easements. This Argument might as well be used in Regard to such an Easement, as a Right to set up Stalls in a Fair or Market. But the Case of the *Mayor of Northampton v. Ward* in 2 *Strange* 1238, is a full Proof "that Trespass is the *proper* Remedy for erecting *Stalls in a Market*." Now if a Person should build a *House*, instead of setting up a *Stall*; Would not an Ejectment lie, by the Owner of the Soil?

Secondly, (under the first Question,) It will also be objected here, "That the Thing demanded is *not sufficiently described*;" The Ejectment being only "for an Acre of LAND."

The Plaintiff's Counsel said they did not dispute the Case of *Knight v. Syms, Carth. 204. 4 Mod. 97. S. C.* [*V. also 1 Salk. 254. S. C. and 1 Shower 338. S. C.*] "That an Ejectment of so many Acres of *Arable and Pasture*, without shewing the *Quantum* of each Sort, is *not good*:" But they observed that in the present Case, two Answers may be given to this Objection; *viz.* 1st. That this is *no Part* of the *Doubt* of the Jury: Therefore the Court will not lay any Stress upon it. 2dly. That the *Special Verdict* has ascertained the Nature and the Quantity and the Situation of this Land; For it is found to be *part of the Waste*, and is described even to *Inches*: So that *the Sheriff can have no Doubt*, WHAT to deliver Possession of.

Second General Question—The Plaintiff's Counsel said that This is an *unconscientious* Defence; as the Defendants have already enjoyed this a hundred Years under these Articles and have *constantly paid* the Rent: And therefore they are ESTOPPED from controverting the *Lessor's Title*. They cited 1 *Salk. 276. Trevivan v. Lawrence & al'*, and 2 *Ld. Raym. 1036, 1048. S. C.* in Support of this Position; and likewise to prove that not only the Parties, but also the Court and Jury, are *bound* by this Estoppel: In further Confirmation whereof, they also cited *Co. Lit. 352. and 231. and Litt. § 374.* 4

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* P. 138.

* And therefore they prayed Judgment for the Plaintiff.

The Counsel for the Defendants began with observing upon particular Parts of the Verdict, which they thought to be material. As that it is expressly found "That part of this Land is part of the " Street, which is *Part of the King's Highway*:" And the third Parcel is expressly found to be " *Other Part of the said Street or " Highway*." And the Jury likewise find, " That the Way is in " Breadth (including the Encroachments) 60 Feet, *and no more*:" Which is FAR from Finding a *Surplus*. That it is *not* found " That the Defendants claim *under Gotley*." That the Ejectment " is for " *one Acre of LAND* with the Appurtenances: But the Verdict describes three Parcels by Inches and Feet. The Plaintiff is found to be Lord of the Manor of *Barton Regis*; in which Manor this Waste lies: And the two Pieces first mentioned are found to be encroached upon and taken in, by erecting a *House*; And that upon the third, certain Palisadoes were erected. And the Doubt of the Jury is " Whether the Defendants were guilty of a Trespass " upon these *Parcels of LAND*." Argument
for the De-
fendants.

Then they proceeded to their Objections.

1st Objection—The Plaintiff's *Demand*, and the *Finding* of the Jury, are *not agreeable* to each other; so as to intitle the Plaintiff to recover, upon this Verdict. For the *Demand* is of an *Acre of LAND, merely*: Whereas it is found " That a House is built upon " the former two Parcels." And this was a Fact within the Plaintiff's *Privity*: And therefore the Ejectment ought to have been brought *for the House*; not for the Land. So is *F. N. B. pa. 192*: Though with a *Qu.* indeed *there*. But, however, *39 H. 6. 8.* and *Bro. Demaunde, pl. 14.* S. C. and also *pl. 5. & pl. 33.* sufficiently prove " that the Demand ought to be, *of an House*; not " of *Arable Land*; (as the Term "*Land*" imports.) So also do *Plowden 168, 170.* *Hyll v. Graunge.* *Jenkins 6th Century, pl. 83. fo. 268.* *Cro. Eliz. 234.* *Hays v. Allen. Co. Entr. 642.* S. C. *2 Roll. Abr. 704.* *Title Trial, pl. 22.* and *Dyer 47. b. Banister v. Benjamin (in margine.)*

And if it was not to be thus *specifically* demanded, *as it is at the Time*; there could be no certainty how to *deliver Possession*. And such Specification would be liable to no Objection: For in *P. 12 G. 1. B. R. Sullivan v. Segrave, 1 Strange 695.* An Ejectment "*de parte Domûs*" was holden to be Good.

But here, the Verdict *finds* What the Plaintiff's Words of Demand are *not* apt and fit to intitle Him to recover.

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* P. 139. * The Sheriff may break open a House, to deliver Possession of Part of it. 5 Co. 91. *Semaine's Case*, 2d Resolution. *Style* 238. More than enough, is Error: And *Less* is bad. In 2 *Ld. Raym.* 1470. *Bindover v. Sindercomb*, A Description of "Part of a House" was holden to be good; because it sufficed to describe it to the Sheriff.

Where the Land may be ascertained, by being at the Plaintiff's Peril shewn to the Sheriff; yet even there, it must be Land of the same Quality, as was demanded; (*ejusdem generis.*) *Savile* 28. *Case* 67. *The Queen v. Ayleworth.* *Cro. Eliz.* 265. *Scriven v. Prince.* *Cro. Eliz.* 465. *Portman v. Morgan.* A Demand of Land must (in our Law) be certain. *Luttrel's Case*, 4 Co. 87. b.

There was a Case of one *Degony Green v. William Johns*, in 1715, where a House was actually *sawn asunder*: (They said they had the Declaration from the Heir of the Defendant.) It was an Ejectment of an Acre of Land, (but *further* described indeed,) Of which the Dean of *Exeter* was the Claimant: And, though there was no Judgment or Execution; Yet, by Consent, the House was *sawn asunder*, in Order to deliver Possession.

Though *strict* Nicety has of late Years been gotten over, yet sufficient Accuracy and Precision is *still* necessary: And *part of a* HOUSE can never be said to be within the Description of Land. *Co. Lit.* 4. a. is no Authority against this; Nor 4 Co. 87. b. And in *Cro. Jac.* 654. *Royston v. Eccleston*—Ejectment "de unâ Domo & de uno Pomario" was holden good, upon the Principle of their conveying a *sufficient Certainty*, so as that the Sheriff might deliver Possession. *Palm.* 337. S. C. 11 Co. 55. *Savel's Case.* 1 *Salk.* 254. *Knight v. Syms.* 1 *Show.* 338. S. C.

And it would be very dangerous, if *Certainty* of Description should not be *strictly* kept to.

Second Objection. This appears to have been *Parcel of the Waste*; and ought to have been *so* described: And also it is *part of the King's HIGHWAY*. Therefore *No Possession*, or no *full* Possession, at least, can be delivered of it.

P. 15 G. 2. B. R. In the Case of *Popple v. Dobson*, "*Waste-Ground*" was thought a good Description: *Sed Adjourn'*. [*Cur' advis'*] *Cro. Car.* 511. *Mulcarry and — v. Eyres and Others*, on Error in Ejectment, from *Ireland*, "*Bogge*" was holden a good Description.

And

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* And it being the *King's public Highway*, the Plaintiff can *never* * P. 140. have *Possession* delivered of it. The Owner cannot levy a Fine of it: Nor can he *distrain* in it; as may be seen in 2 *Inst.* 131.

In Cases of Encroachments or Purprestures on it, these Encroachments are *upon the King*: And so is 2 *Inst.* 272. expressly; “*Dicitur Purprestura, quando aliquid super Dominum Regem injustè occupatur, ut &c; vel in Viis publicis obstructis.*” And the Remedy is by *Presentment* or *Indictment*. 9 *Co.* 113. 5 *Co.* 73. a. 27 *H.* 8. 27. a. But an *Action* lies, *only* where a Man receives a *special Injury*.

How can the Plaintiff have *PLENAM Seisinam* of this? In 1735. 8 *Geo.* 2. There was a Case of *Well-advised, ex dimiss. Sir Bourchier Wray & al' v. Foss & al'* in Ejectment, at the Summer Assizes at *Exeter*. The Declaration described a Piece of Land, containing 40 Feet in Length and 4 Feet in Width, part of the Manor of *f.* But the Plaintiff was nonsuited. For The Land was part of the *Waste*: And upon Evidence, it appeared to be *part of the Highway*, on which the Defendant had built. Lord *Hardwicke* held “That No *POSSESSION* could be *DELIVERED* of the *SOIL* of the *HIGHWAY*; and therefore no Ejectment would lie of it: And if “it was a *Nuisance*, the Defendant might be indicted.”

In the present Case, *All* these three Pieces of Land are part of the *King's Highway*, and are encroached upon: And the two former have *subsisting* Nuisances upon them.

If a Highway lies within a Manor, It must be agreed (especially as found here) that the Lord *has the Property of the Soil*; to be used *consistently* with the Privileges of the Subject: But the Question is, *What REMEDY* the Lord has, in Case of a *Nuisance* upon *such Part* of his Property as lies in the *King's Highway*. We say He has *no specific* Remedy, by Ejectment. The Case of *Sir John Lade v. Shephard*, 2 *Strange* 1004. does not prove that an *Ejectment* will lie: That was *not* an Ejectment; but an Action of *Trespass*. And perhaps an Action of *Trespass* might have been *here* maintained: But not an *Ejectment*. And if the Lord of the Soil should recover and *continue it*, He would thereby become a *Wrong-Doer*: Whereas, according to 2 *Inst.* 294. It is the Wisdom of the Law, so to resolve, “*ut sit Finis Litium.*”

As to *Fitzb. Abridgment* 77. a. It is the Case of *the King*: And by his Prerogative, *He* may continue it, if it be no Injury to the Subject. But a Highway must *always continue* a Highway. *Cro. Jac.* 446. *Fowler v. Sanders*, fully proves “That it *cannot be* narrowed: Neither can it be inclosed.

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* P. 141. * Second General Question. As to the *Estoppel*—It does not appear that the Defendants claim *under Gotley*, therefore that Point is out of the Case.

Reply.

It was urged by the Counsel for the Plaintiff, by way of Reply—That as to the *Estoppel*, the Court must necessarily *intend*, upon this Finding, that the *Defendants themselves* paid the Rent, and erected the Palisadoes in 1748: And the Rent which was paid *from* the End of the Term *till* 1750, must be presumed to be paid BY THEM; they being *then* in Possession. A Special Verdict is not to be taken strictly; like a special Pleading.

[* Observe, that the two Divisions of the first Question were counterchanged, in the Course of this Argument: The Counsel for the Defendants having begun first, with that Objection which the Plaintiff's Counsel had taken up (by way of Prolepsis) in the second Place. V. pages 137, and 138.)

As to the * 1st Objection made by the Counsel for the Defendants—*Non constat* that this Land is built upon: 'Tis only found "That in the new building of a House at *Lafford's Gate* aforesaid, " *Gotley* had ENCROACHED upon the Lord's Waste, so many Feet " &c. But it does not follow that *Gotley* actually BUILT upon the Land, which He so encroached upon. For there are very many other Ways of encroaching upon Another's Land, *besides* building upon it: For Instance, a Penthouse *overhanging* and dropping upon it, may be an Encroachment. No *express* Fact of *building* upon this Land is found. Indeed it is said in the Finding, that the third Piece of Land is *taken in* and enclosed with Palisadoes, by the said *J. Gotley*. But the Palisadoes answer this Expression: He *inclosed* it with *them*.

They agreed to the Doctrine of the Necessity of *sufficient* Certainty in the Demand: But said and insisted that it is *sufficient*, if the Sheriff may know *how to deliver Possession*.

The Term "*Land*" is said by Lord Coke, legally to include *Castles, Houses*, and other Buildings. *Co. Lit. 4. a.* And by a Grant of "all a Man's *Lands*," All his *Houses*, Mills and Woods would *pass*: As appears in *Luttrell's Case*, 4 *Co. 87. b.* And by the Civil Law, "*Appellatione Fundi, omne Aedificium & omnis Ager continentur.*" *ibidem*. Therefore, as they would pass in a *Conveyance*, there is no Reason why they should not be included in an *Ejectment*, upon a *supposed* Lease: Which Lease, if it was a *real* Lease, would undoubtedly carry them.

None of the Things described in the Declaration differ from the Descriptions of them in the Verdict.

Indeed it is only 14 Inches in Length, that it is *pretended* any part of the House now covers. But the Words are, That "whereas " it was presented that the said *J. G. had encroached* upon the " Waste

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“ * Waste of the Manor of the said T. C. &c. 14 Inches in Length * P. 142.
“ and 33 Feet in Breadth, *without his House*; together with a *Porch*
“ of 3 and $\frac{1}{2}$ Feet in Length and 7 Feet in Breadth, *without the*
“ *Wall* adjoining to the House.” Now it is *not* necessary that the
Court should consider these two Pieces of Land, as a *House*; espe-
cially the latter, upon which the Porch is erected.

It is *not* found to have been a Messuage at the *Time* of the Demise
laid. On the contrary, the Pieces of Land incroached upon are
found to be Parcel of the Waste, and part of the *Tenement* in the
Declaration mentioned: Which Tenement is not a House, but an
Acre of Land. However, this Objection cannot overthrow the
whole Verdict: For the *third* Parcel is clearly *Land*, and *not House*.

If a Man builds upon my Land, It would be very hard if I
might not, notwithstanding this, demand my *own LAND*.

If the Ejectment was brought *de parte Domus*, (which they did
not admit that it could be,) how would the Sheriff know *which*
Part to deliver Possession of? The Plaintiff must, in *both* Cases,
show him, at his *Peril*.

Though “*Pomarium*” be good, yet it would equally be good, if
called “*Land*.”

As to the * second Objection made by the Counsel for the Defen-
dants, The Plaintiff's Counsel replied, that the Right is *admitted to*
remain in the Owner of the Soil, to be used consistently with the
Privilege of the Subject: Which Admission is sufficient for our
Purpose. He may dig Sand or Stones; provided He does not com-
mit a Nuisance in the Manner of doing it. Therefore 'tis plain that
He has a private Right remaining in Him.

* See the
Note in pa.
141,

And *ad quod damnum* alters no Property: The Owner retains the
old Road, *discharged* of the Easement, which is *transferred* to ano-
ther Part of his Land.

The Court have nothing to do with the *Nuisance*, in this Case:
It does not appear to the Court, to be any Nuisance to the High-
way; or that Mr. *Chester* will continue it, if he should recover the
Land.

Cro. Jac. 446. was for a special Injury received from the Defen-
dant's laying Logs in the Highway: But though the King can't
narrow his Prerogative, to the Injury of the subject, yet it does not
follow from that Case, that the Property of the Highway is not in
Owner of the Soil.

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* P. 143. Lord Mansfield asked whether they had any Note or Report of that Circuit-Cafe which was said to have been determined by Lord Hardwicke; and by whom it was taken, But there was no Note or Report of it; And it seemed to have been mentioned at the Assizes, from some imperfect Recollection. He Therefore proceeded to give his Opinion immediately; putting this Cafe of Sir Bouchier Wray out of the Way entirely; as being so loosely remembered and imperfectly reported, as to deserve no Regard, nor be at all clear and intelligible. He said it was impossible to suppose that Lord Hardwicke had any Note or Memory of such a Point arising at the Assizes: Otherwise, he would wait till he could know the true State of it from his Lordship, from the Deference he paid to so great an Authority. But from the Manner in which it is quoted, there is no ground to say what the State of that Cafe or Determination really was.

As to the Question “Whether an *Ejectment* will lie, by the “Owner of the Soil, for Land which is *subject to Passage* over it as “the King’s Highway,”

1 Ro. Abr. 392. Letter B. pl. 1, 2. is express—“That the King “has *Nothing but the Passage* for Himself and his People: But the “*Freehold and all Profits* belong to the Owner of the Soil.” So do all the *Trees* upon it, and *Mines* under it (which may be extremely valuable.) The Owner may carry Water in Pipes *under* it. The Owner may get his Soil *discharged* of this Servitude or Easement of a Way over it, by a Writ of *Ad quod damnum*.

It is like the Property in a Market or Fair.

There is no Reason why he should not have a Right to ALL *Remedies* for the *Freehold*; subject still indeed to the Servitude or Easement. An *Assize* would lie, if he should be disseised of it: An Action of *Trespass* would lie, for an Injury done to it.

I find by the Cafe of *Selman v. Courtney*, Tr. 13, 14 G. 2. that a Point which had been before the Court of Exchequer in the Cafe of the Dutcheis of *Marlborough v. Gray*, M. 2 G. 2. is now settled; viz. “that it’s being a Highway cannot be given in Evidence by the “Defendant, upon the General Issue:” Which proves that the Ownership of the Soil is *not* in the King. I see no Ground Why the Owner of the Soil may not bring *Ejectment*, as well as *Trespass*? It would be very inconvenient, to say that in this Cafe He should have no *specific* legal Remedy; and that his only Relief should be repeated Actions of Damages, for Trees and Mines, Salt-Springs, and other Profits under Ground. ’Tis true indeed that he must recover the Land, SUBJECT TO *the Way*: But surely He ought to have a *specific*

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specific Remedy, to recover the LAND ITSELF; notwithstanding * P. 144. it's being subject to an Easement upon it.

Second Question—As to the *Description*—

I don't know whether it is not even *better* described by the Name of the *Land*, than of a *House*, or *part of a House*.

I think it would have made the Objection much *stronger*, if the Plaintiff had only claimed the NUSANCE, instead of the Land on which the Nuisance is erected.

Here He does not claim the *Nuisance*: He claims the *Land*. And the Tenants in Possession of it defend themselves by saying "That they have *erected a Nuisance* upon it. Now it would be a strange thing, if *that* should be a good Defence against the Owner's recovering his *Land*.

But however, this is not a *House* (which perhaps ought, if it were so, to be particularly named;) but merely a *Wall* or PART of a *Wall* or Building: And there is not such Preciseness required in *Ejectment*, as there is in *real* Actions.

The Courts will go to the utmost Extent, in *support of Ejectments*; that People may have *specific* Remedies for their Rights.

Dyer 47. *a. pl.* 6. is very strong. There, the Recovery was, of "100 Acres of Land, 20 Acres of Meadow, and 40 Acres of Pasture, in *D.*" without mentioning any House or Garden: And the better Opinion seems to be "That the Plaintiff should thereby "recover the *Buildings* built thereupon."

That was an Action of a *higher* kind than an Ejectment: It was a *real* Action, a Writ of Intrusion, in which *that* Recovery was had.

But here, the Building erected is only PART of a House or Wall: And it is erected, *by Incroachment*, upon the Plaintiff's Land.

The Case of the Defendant is most unfavourable: For he insists upon holding the Thing demanded without any Pretence of Title; and insists that the Plaintiff shall have no *specific* Remedy for his Land.

Therefore I am of Opinion that the Plaintiff ought to recover upon this special Verdict.

Mr. Just. *Denison* concurred.

The

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* P. 145. * The Difficulty at the Assizes arose (as the Judge who tried the Cause has † declared, merely upon an Apprehension that there had been a Determination at the Assizes formerly, by Lord *Hardwicke*, who tried the Cause, had declared this, “ That an Ejectment would *not* lie for a Property in Soil, over which there was a *Highway*; because the Sheriff could not deliver Possession of the Highway.”

Argument.

He said He

should have

had no doubt

about it, at

the Trial;

but upon it's

being alledged

ed “ that

Lord *Hard-*

wicke, (for

whom every

One has and

ought to have

a Venera-

tion,) had

made such a

Determina-

tion:” And

he would not

take upon

Himself, to

over rule the

Opinion of

so great a

Man.

But the *Reality* of this Authority has not been at all proved, to any kind of Satisfaction.

Trespass would undoubtedly lie: Why then should not an Ejectment?

It is said “ That the Sheriff cannot deliver *full* Possession.”

But why not? Indeed, it must be *subject* to the Easement: But there is *no other* Difficulty in the Matter.

Therefore I take it for granted, that there was something more in that cited Case of Sir *Bourchier Wray's*, than We are now apprized of.

As to the second Question—

It might have been perhaps difficult to have described this *part* of a House.

In that Case in *Dyer* 47. *a.* I take it that the Formedon in Reverter was well brought for the LAND, *secundum formam doni*: The Plaintiff had nothing to do with what the Defendant had done with it, or built upon it. And I think the four Judges who held on that side of the Question, were in the Right.

And upon this special Verdict, the Sheriff would have no Difficulty to deliver Possession; for any thing that I can see, to raise any.

I think that Case in *Dyer* is good Law, That was in a *real* Action: And much more will the same Reason hold upon *Ejectment*, (which would even lie for *Tithes*.) [*V. Cro. Car.* 301.]

And I think this Ejectment was *better* and more properly brought for *Land*, than it would have been for “ *part of a House*.”

Mr. Just. *Foster* agreed that the Case in *Dyer* was good Law.

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* And he repeated, that He had no doubt of the present Case, * P. 146. when it was before Him at the Assizes, *but* from the *then*-apprehended Authority of the cited Case, *said* to be determined by Lord Hardwicke. [*V. ante* 145.]

The Owner of the Soil has a Right to ALL ABOVE *and* UNDER Ground, *except* only the Right of Passage, for the King and his People.

And the Case in 1 Ro. Abr. 392. Letter B. proves this. [*V. ibid. pl. 1, 2, 3, 4, 5 & 6.*]

Therefore He entirely concurred with his Lordship and his Brother Denison, (for N. B. Mr. Justice Wilmot was * not present * ^{V. ante 133.} in Court at either of the two Arguments of this Case,) that there should be

JUDGMENT for the PLAINTIFF.

Tooker *vers.* Duke of Beaufort.

A New Trial had been moved for, on a supposed *Misdirection* by the Judge who tried the Cause, in *admitting* a Commission under the Seal of the Court of Exchequer, P. 33 Eliz. Rotulo 290. to be given in *Evidence*; although it was objected at the Trial, "That this Commission was "*Res inter ALIOS acta*"; of which "the Beaufort Family could have *no Notice*, nor *Opportunity to defend it*; and therefore it could not *affect* them: Consequently, "it *ought NOT to have been AT ALL admitted as Evidence*; for the "same Reason that a *Verdict* in a Cause between *other Parties* cannot be given in Evidence in a Cause between Strangers to the "former Cause.

N. B. This Commission (P. 33 Eliz. Rotulo 290, in Scacc') was directed to 5 Commissioners therein named, *ad inquirendum, tam per Sacrum proborum & legalium hominum Com' nr'i Southton, quam per Depositiones quorumcunque testium, ac omnibus aliis viis mediis & modis quibuscunque, "Si Prior out Prioratus Sci' Swithini Winton, in jure Domus sive Prioratus, "fuit seistus in quibusdam terris vocat' Woodcrofts &c, ut "Parcell' de Manerio de Hinton-Daubney;" Necnon, "Si "Henricus, Pater noster, (in ejus vita,) Dominus Edwardus sextus, Regina Maria, aut Nos ipsi, à tempore Dissolutionis "Prioratus Sci' Swithini &c. &c."* with an Order for the Sheriff to summon a Jury, &c.

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* P. 147. To this, is returned An Inquisition taken the 9th of April
33 Eliz: Whereby it is found "That the Prior of St. Swithin, in
" right of his Priory, was *seised* of the said Lands called *Wood-*
" *crofts &c*, As Part and Parcel of the Manor of *Hinton-Dawdney*;
" and that *from* the Dissolution of the said Priory, King H. 8.
" King E. 6. and Queen Mary were *seised*, and Queen Elizabeth
" Herself, in the same Right, to the 27th of May then last past."

There are also returned The Interrogatories administered on her Majesty's Behalf, and the Depositions taken thereon.

The Substance of the Judge's Report was, That He *admitted* this *Commission* and the *Return* to it, and the *Depositions*, to be read in Evidence; Holding them to be *admissible* Evidence, though *not* conclusive. That there was likewise much *Parol*-Evidence of the Possession of *both* Parties; and that there had been a *mixed* Possession: But that He, in his Direction to the Jury, did lay great *Stress* on this *Commission*, &c: And that *WITHOUT* its *Assistance*, He should have thought the Verdict for the Plaintiff to have been a very hard One.

The Report concluded, "That He Himself (the Lord Ch. Baron) thought this Piece of Evidence to be *admissible*, but *not* conclusive; That it had great Weight with the Jury; And that " if the Court should be of Opinion that it was *not* *admissible*, He " thinks there ought in *that* Case to be a new Trial."

This Matter having been largely debated at the Bar, and afterwards fully considered by the Bench; And the Court having been of Opinion "That the Evidence *was* ADMISSIBLE, though NOT " *conclusive*; and therefore that it was well and properly received;" And consequently, "That the Rule for shewing Cause why there " should not be a new Trial, should be discharged;" The said Rule had been accordingly discharged.

But in the Interim, whilst this Question was depending before this Court, (who took Time to advise upon it,) The Duke of Beaufort, the Defendant DIED.

Whereupon, (on Saturday, 13th November 1756) Mr. Gould, on Behalf of the Plaintiff, moved for Leave to *enter up his Judgment*, as of the *next Term after the Verdict*; Which was the Term in which He *might* have entered it up, if the Motion had not obstructed it. 1 Leon. 187. *Isley's Case*.—It is discretionary in the Court to grant this or not. 1 Sid. 462. *Crispe and Jackson v. Mayor of Berwicke*, in Point. 1 Ventr. 58, 90. S. C. in Point. And in
Hilary

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* Hilary Term last, the Case of *Wyndham v. Cbetwynd* S. P. (though * P. 148. a premature Application.)

LORD MANSFIELD—It seems reasonable: Take a Rule to shew Cause.

And

On Friday, 28th January 1757, On Mr. Gould's Motion, This last Rule (for entering up the Judgment, as of the Term next after the Verdict,) was made * absolute, without De-
fence. * V. post. pa. 226. S. P.

Rex *vers.* Maurice Jarvis.

Saturday,
29th January
1756.

THIS was a conviction, (which stood in the Crown-Paper) upon 5 *Ann. c. 14.*

It was made by *John Bythessea* and *John Turner* Esq; two Justices of the Peace for the County of *Wilts*; and was to the Effect following—

Be it remembred, that on *Ec*, *John Webb* of the Parish of *Hilpert* in the County of *Wilts* afore said, Yeoman, in his own proper Person, cometh before Us *Ec*, Justices *Ec*. And now he giveth us the said Justices to understand and be informed, That One *Maurice Jarvis* of *Trowbridge* in the County of *Wilts* Labourer, within three Months now last past, that is to say, on the 4th Day of *September* now last past, in the 28th Year *Ec*, with Force and Arms, in a certain Field commonly called *Ec*, lying and being within the Parish and Manor of *Hilpert* afore said in the County of *Wilts* afore said, did unlawfully keep and use, and had in his Custody and Possession One Setting-Dog and Setting-Net for the Destruction of the Game; and did *then* and there ride with and hunt the said Setting-Dog, with an Intent to kill and destroy Game; He the said *Maurice Jarvis* at the Time and Place when he so kept and used the said Setting-Dog and Net and had the same in his Custody and Possession, *was NOT qualified BY ANY LAWS OR STATUTES OF THIS REALM, to kill Game or to keep or use any Nets Dogs or other Engines for the Destruction of the Game; contrary to the Form of the Statutes in that Case made and provided.* And thereupon afterwards, that is to say on the said 12th Day *Ec*, at *Ec*. afore said, *Thomas Webb*, Servant and Game-keeper to *Edward Eyles* Esq; for the Manor of *Hilpert* afore said in the County of *Wilts* afore said, a credible Witness in this behalf, in his own proper Person, cometh before Us *Ec*; and taketh his Corporal Oath on the Holy Gospel of God, to speak the Truth of and concerning the Premises abovementioned and specified in the said Information before

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* P. 149. * fore Us the said *Ec*, the Justices aforesaid, having sufficient Power and Authority to administer the said Oath to the said *Thomas Webb* in this behalf: And the said *Thomas Webb* being so sworn as aforesaid, afterwards, that is to say, on the said 12th Day *Ec*, upon his said Oath so taken before Us the said Justices as aforesaid, saith deposeth and sweareth, of and concerning the Premises aforesaid in the said Information abovementioned and specified, “ That *Ec*, [fully
“ proving the Fact;] He the said *M. Jarvis*, at the Time and
“ Place when he so kept and used the said Setting-Dog and Net and
“ had the same in his Custody and Possession, was NOT QUALI-
“ FIED by ANY Laws or Statutes of this Realm, to kill Game, or to
“ keep or use any Nets Dogs Guns or other Engines for the Destruc-
“ tion of Game, contrary to the Form of the Statutes in that Case
“ made and provided.”

Whereupon the said *M. J.* having first been duly summoned in this behalf to answer the Premises, and having had due Notice thereof, afterwards, that is to say, at the House of *Ec*, appearing and being present in his proper Person before Us the said *Ec*; And the said *Thomas Webb* the Witness aforesaid also appearing and being present before Us the said Justices; And the Information aforesaid and the Matter therein contained, and also the said Evidence thereupon given, having been heard and understood by the said *M. J.* in the Presence of the said *Thomas Webb* the Witness aforesaid and of Us the said Justices; He the said *Maurice Jarvis* is asked by Us the said Justices, “ If he the said *M. J.* hath, knoweth, or can say
“ any thing for himself in his own Defence, touching and concern-
“ ing the Premises aforesaid; and why he the said *M. J.* should
“ not be convicted of the Premises aforesaid, charged on him in
“ and by the said Information.”

And the said *Maurice Jarvis*, now here before Us the said Justices, DENIES that he did KEEP AND USE the said Setting-Dog and Net, and had the same in his Custody and Possession, in Manner and Form as is above charged on him: But shows no sufficient Cause before Us the said Justices, why he should not be convicted of the Offence aforesaid charged on him in the said Information. And upon hearing and examining the whole Matter aforesaid, and every thing alledged by the said *Maurice Jarvis* touching and concerning the Premises aforesaid, It manifestly and plainly appears unto Us the said Justices, That the said *M. J.* was not THEN any wise qualified impowered licensed or authorized, by or according to the LAWS OF THIS REALM, to kill Game; And that the said *M. J.* is guilty of the Premises aforesaid charged on him in and by the said Information.

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Therefore it is now here considered and adjudged by Us the * P. 150.
said Justices, that the said M. Y. upon the Testimony of the said
Tho. Webb the Witness aforesaid, on his Oath before Us the said
Justices so taken as aforesaid, be and is convicted of the Premises
aforesaid, according to the Form of the Statutes in such Case made
and provided; And that the said M. Y. do forfeit the Sum of 5 l.
for the Offence aforesaid, as the Statute directs, &c.

Mr. Gould, for the Defendant, took Exceptions to this Conviction.

1st. The Justices have *not* SHEWN *that they had* JURISDICTION
over this Defendant. For they have not sufficiently shewn his DE-
FECTS of *Qualification*; which ought to have been SPECIFICALLY
particularized, with an Allegation “that he had not *any One* of
“them:” I mean the Qualifications mentioned in 22 & 23 C. 2.
c. 25.

To prove this to be necessary, he cited *Rex v. Ellers*. [Qu.
what, or where, or when.] H. 12 G. 1. 2 *Ld. Raymond* 1415.
Rex v. John Hill; most directly in Point. *Bluet, Qui tam, v. Needs*,
P. 9 G. 2. in C. B. (entered Tr. 7, 8 G. 2.) *Comyns* 522, 523. *Paf.*
9 G. 2. (which he also cited, to shew the Distinction between a
Declaration and a Conviction;) A General Averment is sufficient in
a Declaration: But *Convictions* must set forth WHAT *was the WANT*
of Qualification.

M. 19 G. 2. B. R. *Rex v. Pickles*, [the 2d Exception in that
Case;] Where it was indeed holden that it was not necessary to in-
sert the *inferred or argumentative Qualification* (collected from
5 *Ann. c. 14.* but not mentioned in 22 & 23 C. 2.) “of his not
“being Lord of a Manor:” But it was there agreed, that those re-
quired by the Act of 22, 23 C. 2. c. 25 *ought* to be negatively spe-
cified.

1 *Strange* 497. *Rex v. Sparling*, H. 8 G. 1. B. R. which was a
Conviction for swearing: And his Occupation was therein said to be
a Leather-dresser; but it was not shewn that he was not a Servant,
Labourer, Common Soldier, nor Seaman. The Court held, that
giving Him the Addition of Leather-dresser was not enough; and
instanced the *Necessity of specifying the Particulars* of the Defen-
dant's want of Qualification, in *Convictions on the Game-Act*; in
order to give the Justices a Jurisdiction which they, otherwise, *have*
not: And they also held that Conviction naught, because the parti-
cular Oaths and Curses were not set forth. And that Conviction
was accordingly quashed.

2d Exception. The Witness was examined privately and *ex*
parte, prior to the Appearance of the Defendant, and in the Absence
Q q of

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* P. 151. * *of the Defendant*, So that the Defendant had *no Opportunity of Cross-examining Him*.

3d Exception. The *Time when* the Defendant was unqualified is not at all ascertained, in the Adjudication of his being guilty. For it is only averred "That he was *THEN* unqualified:" But *several Days and Times, distinct from each other*, have been antecedently mentioned. [V. 148, 149, 150.

Mr. Norton *contra*, for the Conviction, begun with the 2d Exception—It was *necessary* for the Justice to take a *previous Examination*, as a Ground and Foundation for his issuing the Summons: And when the Defendant attended, after having been summoned, the Evidence was then read to him; and the Witness also attended; and the Defendant was asked "what he had to say for himself;" and did not desire to cross-examine the Witness.

To the 1st Exception—He answered—first, by citing *Rex v. Chandler*, in 1 *Ld. Raym.* 581. Where *Holt*, in delivering the Opinion of the Court upon a Conviction for Deer-Stealing, says "that it is *sufficient* for the Justices, to pursue the *WORDS* of the Statutes; and they are not, in these summary Convictions, confined to *nice and strict legal FORMS*; it is enough, if they pursue the *Intent* of the Statutes."

If the Defendant is *really* qualified, *he* may shew it: But how can the PROSECUTOR *prove the NEGATIVE*? Some of the Qualifications are such as *cannot* well be proved in the *Negative*: But it is easy for *him* to prove the *Affirmative*.

Tr. 9 G. 2. Rex v. Ford—Conviction for keeping an Alehouse, without Licence. Objected, That there was another former Law upon which He might have been convicted: And in 3 *C. 1. c. 3.* there is a Proviso to exempt such as have been so. But *Cur.* held that if the Defendant had been before punished upon 5, 6 *E. 6. c. 25.* he might have shewn this. *V. 1 Strange* 555. *S. C.*

Rex v. Theed, 1 *Strange* 608. Conviction for obstructing an Excise-Officer, who came to weigh Candles. Objection, That the Excise-Officer's Entry might have been by Night, (by 8 *Ann. c. 9.*) And then there ought to have been a Constable present. *Cur.* That might have been shewn on the Part of the Defendant, if in Fact so; And then he would not have been convicted: But they would not presume it.

Now here, the Defendant did not insist upon being any way qualified; but only denied the Commission of the Fact.

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* This Conviction follows the very Words of the Act of Queen * P. 152.
Anne: which does not enumerate the Qualifications, as that of C. 2.
does: And this Conviction is on the * Act of Queen *Anne*; and not * 5 *Ann. c.*
on 22, 23 C. 2. c. 25. 14.

10 *Mod. (Lucas) pa. 27. Queen v. Matthews, Tr. 10 Ann. B.*
R. [1st Exception.]

Viner's Abr. Tit. Game, Letter A. fo. 3. S. C.

Burn, Tit. Game, fo. 304. S. C. Which was a Conviction on
5 *Ann. c. 14.* Where one of the Qualifications (*viz.* not being a
Game-keeper, &c, being a new Qualification allowed by that Act)
was omitted. And *Cur.* held that it was not necessary to enumerate
ANY: But as some of them were enumerated, it was fatal to omit
another of them. [N. B. This Case was adjourned.]

Rex v. Marriot, 4 G. 1. (1 Strange 66.) was the very Point.
It was holden indeed that the WITNESS cannot take upon Himself
to adjudge the Qualification: But no Notice at all was taken, in the
Determination of that Case, of the JUSTICE not having adjudged
it.

Clearly, this Defect can, at the utmost, be only *Form*: For in
Substance, 'tis the same thing. And it follows the Act of 5 *Anne*
in Terms.

As to the Case cited by Mr. *Gould*, of *Rex v. Ellers*—It does
not appear what the State of the Case was.

And the Case in *Comyns* 522, 523. rather makes for Us. It is
as reasonable that the Defendant should make it out, that he was
qualified, and shew how, on a Conviction, as in an *Action*.

In the Case of *Rex v. Pickles*,—The Conviction was affirmed:
And yet a Qualification within the Acts was omitted.

And this Law can never, or hardly ever, be executed, if the
Court should think themselves bound down by the Case of *Rex v.*
Hill [in 2 *Ld. Raym.* 1415.]

3dly. As to the third Exception—

But Lord *Mansfield* stopt him from proceeding, and also Mr.
Gould from replying: For he said it was needless to enter into many
Reasons for quashing this Conviction, when One alone is fully suffi-
cient.

It

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* P. 153. It is now settled, by the uniform Course of Authorities, that the Qualifications MUST *be All* negatively set out: Otherwise, the Justices have *no Jurisdiction* over the Persons killing Game, or keeping Dogs or Engines for the Destruction of it.
(1st Exception.)

The *Obiter* Saying in 10 *Mod.* (if it was a Book of better Authority than it is,) would signify Nothing, when the *Determinations* are the other way.

There is a great Difference between the *Purview* of an Act of Parliament, and a *Proviso* in an Act of Parliament.

In the Case of *Rex v. Marriot*, Mich. 4 G. 1. B. R. [1 *Strange* 66.] Where the *Witness* swears only generally; it was holden insufficient: And the *Justices* who convict *upon the Evidence* of the Witness, can have no other or FURTHER Ground to go upon than what the Witness swears.

In the Case of *Rex v. Hill*, 2 *Ld. Raym.* 1415. in this Court, H. 12 G. 1. It is the very Point established and settled, "That the General Averment is NOT sufficient; and that it must be averred that the Defendant had NOT the particular Qualifications mentioned in the Statute, as to Degree, Estate &c."

In the Case of *Bluet, Qui tam, v. Needs, Comyns* 525. The general Averment "of the Defendant's not being qualified, was holden to be sufficient upon an *Action*; though *insufficient* upon a *Conviction*."

The Distinction is obvious between an *Action* and a *Conviction*. And there it was agreed (and it is given as the Reason why it is not good upon a *Conviction*), "that it must be made out, before the Justice, That the Party had *no* such Qualification as the Law requires," before the Justice can convict him: And the Justice must return "that he had no manner of Qualification."

Here, the Witness swears only generally, "That the Defendant was *not* qualified &c." The Justices *adjudge* it GENERALLY, only. The *Stream* can go no higher than the *Spring-Head*. So the Conclusion which the Justices draw from the Testimony of the Witness must be as general as that Testimony.

In the Case of *Rex v. Pickles*, It was laid down as a Rule, "that the Want of the particular Qualifications required by 22 & 23 C. 2. c. 25. ought to be *negatively* set out in *Convictions*:" And the only Question there was, Whether it was necessary to add—"Nor Lord of a Manor." *Exceptio probat Regulam*: Nor was the general Rule at all, doubted or disputed, in that Case.

In

Hilary Term 30 Geo. 2.

* In Indictments upon 8, 9 *W. 3. c. 26.* for having a Coining-Prefs, Every thing which shews that the Defendant had no Authority, must be negatively set out. And so it was done, in the Indictment of *Bell*, which was lately argued before all the Judges. * P. 154.

I take the Point to be SETTLED by the constant Tenor of all the Authorities; And, I think, upon very good Reason, (if there was need to enter into the Reason at large, after it has been fully settled already.)

Therefore I am of Opinion that the Conviction ought to be quashed.

Mr. Just. *Denison* concurred with Lord *Mansfield*.

He said it was a clear Case; And that it was fully settled and established, "That in these *Convictions*, the Want of the particular Qualifications mentioned in the Act of 22 & 23 C. 2. ought to be negatively set out:" If not, the Justices have no Jurisdiction to convict the Defendant as an Offender. And the Evidence and Adjudication ought, both of them, to be, "That he has not these Qualifications, which are specified in that Act; nor any of them." (1st Exception.)

Indeed you are not obliged to go further than the Words of this Act of Parliament of 22 & 23 C. 2. and that was the Case of *Rex v. Pickles*. But however, in that Case, the present Point was established, and taken to be indisputable.

It is said, that "It is sufficient to lay the Offence in the Words of the Act of Parliament."

But that is not ALWAYS sufficient: It may be necessary to go further. P. 28 G. 2. B. R. *Rex v. Chapman*, about robbing an orchard, was a Case where the mere pursuing the Word of the Statute was not sufficient.

But this Point now before Us is a settled Case: And therefore there is no Need to enter into Arguments about it.

The Conviction ought to be quashed.

Mr. Just. *Foster* concurred.

R r

On

Hilary Term 30 Geo. 2.

* P. 155. * On Negative Acts of Parliament, the Point is fully settled and established, "that the particular Qualifications mentioned in the Second Ex-ception. " Purview of them, must be negatively specified in Convictions " made upon them."

By the Court unanimously,

CONVICTION QUASHED.

Royal-Exchange Assurance Company *vers.* Vaughan.

Tuesday 1st
February
1757.

THIS Case was just mentioned to the Court, on 18th *November* 1755; and again, on 3d *February* 1756: But was first argued on 7th *May* 1756; and now, lastly, on this Day.

It was an Action of Trespafs, brought by the Company: And the Question (upon a special Verdict) was, "Whether this Company are " *at all, or how far they are liable to be ASSESSED to the LAND-Tax.*"

The Special Verdict was very long. In it were found, at large, the *Statute* of 6 G. 1. c. 18. which gave Rise and Establishment to this Company; and the several *Charters* from the Crown which increased its Fund, and enlarged its Powers beyond what they were originally intended (or at least explicitly established) by that Act of Parliament; The Original Foundation of it being only for Insurance of *Ships*, with a smaller Fund: But the subsequent Charters extended their Powers, to Insurances of *Houses* and *Goods* from Fire, and upon *Lives*; and also increased their *Fund*.

In the abovementioned Act of Parliament, the *Original* Fund was *expressly exempted* from being taxed.

Several Facts were also found: Particularly, the Manner in which this Company have carried on their Business, under *all* these Powers *jointly*, and not under each *separately*.

The present Assessment is for their *whole* Stock, and in their *Corporate* Capacity.

They *never had* been taxed *at all*, till now. And they were now taxed, in their *Corporate* Capacity, under the Land-Tax Act of 27 G. 2. c. 4: (of which, see *pages* 48, 64 & 75.)

By the Act of 6 G. 1. c. 18. their Capital was 1,500000 *l.*: And they were thereby *exempted from All Parliamentary Taxes*. This was only a Power to Insure Ships and Goods at *Sea*.

Hilary Term 30 Geo. 2.

* A few Years after, the very same Persons obtained a Charter to * P. 156.
extend their Power to insure Houses and Goods at *Land*, and upon
Lives; and also to extend their Capital 500000 *l.* farther than the
former Sum.

Upon the first Argument—

The Court seemed, All of them, to see this Matter pretty much
in the same Light: And they all made two Questions; into which,
they divided the whole of this Case; *viz.*

1st. Whether the *Original* Capital that was raised under the Act
of Parliament of 6 G. 1. c. 18. (§. 2.) and was now become part of
the Fund of the PRESENT CHARTER-Corporation, was exempted
from Parliamentary Taxes, by Virtue of the exempting Clause con-
tained in 6 G. 1. c. 17. (§ 10.) which Act of Parliament related
only to the *Original* Company for Insurance of *Ships*; but did not
extend to the *present* Corporation established by *Charter*; which
Charter has extended their Power and enlarged their Capital.

2dly. Whether this *Original* Capital was the personal Estate of
the COMPANY; and liable to be taxed as the COMPANY's personal
Estate, in their Corporate Capacity: Or whether the Tax ought to
have been laid upon each individual Member of the Company, for
his respective Share, in his own proper Ward.

As to the first Question—The Court were unanimous and clear,
That the Exemption under the Act of Parliament of 6 G. 1. was
confined to the *Original* Fund and Company established by that Act;
and could not be extended to the present Corporation, which was
founded upon a subsequent *Charter* of the Crown, which neither
did nor could give any such Exemption.

And they thought that this *Original* Capital having been part of
the *Statute*-Company's Fund, and only continued by the *Charter*-
Corporation, made no Difference in the Case.

As to the 2d Question, They thought it a Point of Importance
and extensive Consequence; and therefore desired a further Argu-
ment: Though they seemed inclined to think that it was PROPERLY
taxed, as part of the Company's Personal Estate, in their CORPO-
RATE Capacity, by Virtue of the Clauses in *fo.* 48 & 64 of 27 G.
2. c. 4. It therefore stood over, for an

ULTERIUS CONCILIUM.

Upon which further Argument, Lord Mansfield was so extremely
clear, that He said he had been endeavouring (to the utmost of his
Power) to raise a Doubt; but could not.

In

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* P. 157. * In 4, 5 *W. & M.* the Districts and Divisions were allotted. So that the Question here is only between the DIVISIONS: Not between the *City*, and the *Company*.

And this special Verdict was only meant, (as it is plain by the Finding,) to try the *first* Point. Nothing is found about Shares of Proprietors: Nor was this second Point then thought of.

It's plain they are to be rated AS *a CORPORATE* Body, by *fo. 76*. And to rate the *Individuals*, would be *almost impossible*. The Argument would prove too much; *viz.* that *No* Corporation could be taxed.

The *Hudson's Bay Company* are said to be rated *for their Stock*: And there is a particular Direction given, *where* the Bank of *England* are to be rated.

Mr. Just. *Denison* concurred.

The *Original* Capital raised under 6 G. 1. c. 18. was intended for *another Purpose*. The Question was certainly made upon the *first* Point: And this second Point was not, I dare say, at that Time, thought of. And here is nothing stated, to bring this second Point within the Clause in *fo. 75 & 76* of the Act of 27 G. 2. c. 4. Therefore We cannot take this to be any more than the Common Case. They are taxed as a *Corporate* Body, within the Clause in *fo. 48*: And I do not see how they could have been taxed otherwise.

Therefore Judgment ought to be for the Defendant.

Mr. Just. *Foster* was of the same Opinion.

The 1st Point, He observed, was determined before the present Argument, and rightly. The Company had imposed both upon the Crown, and upon the Adventurers, by blending their different Stocks together.

As to this second Point, It can't bear a Question "Whether they should be taxed in their *Corporate* Capacity, or as *Individuals*." It was intended, and it is the natural and proper Way, to tax the *Corporation*, in their *CORPORATE* Capacity. And this is what the Act manifestly meant: The Tax is to be paid out of the Stock; and this will occasion a proportionable Deduction out of the Dividends.

BY THE COURT unanimously, (Except that Lord Commissioner *Wilmot* was, at the Time of the second Argument, absent in Chancery,)

JUDGMENT for the DEFENDANT.

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Master and Senior Fellows of John's College, Cambridge, *vers.* Todington, Clerk.

* P. 158.

Thursday 3d

Feb. 1757.

A Prohibition had been prayed by the College, to be directed to the Bishop of *Ely*, to prohibit Him from proceeding upon a Monition issued by Him against them, upon Mr. *Todington's* Application and Appeal to Him, AS VISITOR of the College : And the College had thereupon obtained a Rule to shew Cause why a Prohibition should not go. Which Rule to shew Cause was made upon a Suggestion " That the Bishop was NOT *Visitor* of the College, " AS TO *Elections* into Fellowships and other Offices"; and also, " that admitting him to be so, yet the *present* Matter (which related " to a *SOUTHWELL-Fellowship*) was NOT *within his Jurisdiction*:" For the Suggestion set forth a Deed of Covenants (all on the part of the College,) relating to a Foundation of 2 Fellowships and 2 Scholarships by Dr. *Keton*; in which Deed and Covenants, a Power is reserved to Dr. *Keton*, to make Statutes (to which his Fellows and Scholars were to be sworn,) so as they should be conformable to the Statutes of the Founders of the College. And there is also a PENALTY and Forfeiture given to Dr. *Keton* and his Trustee, and also to the Church of *Southwell*; and a *Clause of DISTRESS*, for the said Forfeiture or Penalty, upon two of the College Manors, in Case the College should break the Covenants. The Suggestion adds " That Dr. *Keton*, in Fact, never gave any Statutes, or made any " Declaration, in relation to these Fellowships."

The Gravamen complained of, is a Citation from the Bishop of *Ely* to the Master and Senior Fellows, upon the Complaint of the said *Tho. Todington*, Clerk, on his being refused an Election into One of these two *Southwell-Fellowships*; shewing, " That he was " within the Description of the Endowment; whereas they had " chosen one *William Craven*, who (as Mr. *Todington* alledged) " was NOT *so*; and that the Bishop had also cited the said *William Craven*, as well as the said Master and Senior Fellows, to appear " before Him at *Ely-House*, &c.

In Order to have a clear and full Conception of this Case, it may be necessary to specify this Suggestion at large; and also to premise some other Particulars which are requisite to be known: Which are, 1st. The *Deed* between the Executors of *Margaret Countess of Richmond* (the Foundress) and Bishop *Fisher*, confirmed by the Prior and Convent of *Ely*; 2dly. Some Extracts from Bishop *Fisher's Statutes*; and 3dly. Some Extracts from *those Statutes* which Queen *Elizabeth* afterwards gave to this College, and under which the College have ever since acted.

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* P. 159.

The SUGGESTION, (at large—)

Hilary Term in the 29th Year of the Reign of King George the Second.

England to wit. **B**E it remembered that on the Eleventh Day of *February* in this same Term, come into Court here *John Newcome* Doctor in Divinity Master of the College of Saint *John* the Evangelist in the University of *Cambridge*, and the Senior Fellows of the said College; and give the Court here to understand and be informed, that whereas all Pleas of and concerning any Lands and Tenements, and of and concerning any Estate or Interest of Freehold, and also of and concerning the Construction and Operation of Deeds and Writings under Seal, and of Debts arising thereby, and the Cognizance of the same Pleas, to the Lord the King and his Royal Crown especially appertain and belong, and at the Common Law in the Courts of Record of our Lord the King, and not in the Ecclesiastical Court nor by any Ecclesiastical Judge, ought to be tried discussed and determined, and always hitherto have been so accustomed to be tried discussed and determined; and whereas the Bishop of *Ely* for the Time being is *not Visitor* of the said College, *as to Elections into Fellowships or other Offices* in the said College, nor hath any Visitatorial Power or Jurisdiction whatsoever over the Master and Fellows of the said College or any of them in *that* respect; and whereas by an Indenture Tripartite made the Twenty-seventh Day of *October* in the Twenty-second Year of the Reign of our Sovereign Lord King *Henry* the Eighth, Between Sir *Anthony Fitzherbert* Knight then one of the King's Justices of his Common Pleas and *John Keton* Doctor of Divinity and Canon of the Cathedral Church of *Salisbury* upon the one Part, The Chapter of *Southwell* within the County of *Nottingham* upon the second Part, and the then Master Fellows and Scholars of the College of Saint *John* the Evangelist in the University of *Cambridge* upon the third Part, it was covenanted condescended and agreed between the said Parties for them their Heirs and their Successors for ever in the Form following that is to wit, First, The same Master Fellows and Scholars of the College of Saint *John* aforesaid had granted, for them and their Successors for ever, unto the aforesaid *Doctor Keton*, that *he* for himself, at the Nomination and Appointment as thereafter expressed, should have *two Fellows* and two Disciples founded and sustained at the Costs only of the said Masters Fellows and Scholars within the College of Saint *John* aforesaid, there *to continue for ever* of his Foundation, over and above other Fellows Scholars or Disciples then founded or thereafter to be founded

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founded by the Foundress of the said College or any other Person * P. 160.
or Persons that then had given or thereafter should give Lands or
Goods to such Purpose and Intent; And the said Master Fellows
and Scholars of the said College thereby covenanted and granted
unto the said Sir *Anthony Fitzherbert* Doctor *Keton* and to the said
Chapiter, and to their Heirs and Successors, that the said Fellows
and Scholars or Disciples of the Foundation of the said Doctor
Keton should have and enjoy all Manner of Profits, as well Meat
Drink and Wage as all other Commodities Easements and Liberties,
like and in as large Manner as other Fellows and Scholars of the
same College by the Foundress' Foundation of the same College
then had or in Time then coming should have in any Manner of
wise, at the proper Costs and Charges of the same Master Fellows
and Scholars of the College of Saint *John* the Evangelist aforesaid
and of their Successors for ever; And the same Master Fellows and
Scholars by the said Indenture covenanted and agreed unto the said
Sir *Anthony Fitzherbert* Doctor *Keton* and *Chapiter of Southwell* and
to their Heirs and Successors, that the same two Fellows of the
Foundation of the said Doctor *Keton* should have receive and per-
ceive of the said Master Fellows and Scholars and their Successors
every Year twenty-six Shillings and eight Pence Sterling over and
above the Wage limited to other Fellows of the Foundress' Foun-
dation, that is to say, to either of them eight Shillings and four
Pence Sterling, at the Feasts of *Easter* and Saint *Michael* yearly, by
even Portions: Furthermore, the said Master Fellows and Scholars
of Saint *John* aforesaid thereby covenanted and granted for them
and their Successors unto the said Sir *Anthony Fitzherbert* and Doc-
tor *Keton* or the longer liver of them, that they from thenceforth
should have the *Nomination and Election of the said Fellows* and
Scholars or Disciples during their Lives natural, and after the de-
cease of the said Sir *Anthony Fitzherbert* and Doctor *Keton* then the
said Fellows and Scholars or Disciples should be at the Nomination
and Election of the said Master Fellows and Scholars of the College
of Saint *John* aforesaid and of their Successors for ever, *after and*
according to such Ordinance and Writing as the said DOCTOR
KETON should thereof make and declare by his last Will or otherwise;
PROVIDED ALWAY that the said Fellows and Scholars or Disci-
ples should be elect and chosen of those Persons that be or had been
Queristers of the Chapiter of Southwell aforesaid, if any such able Per-
son in Manners and Learning could be found in *Southwell* before said;
And in Default of such Persons there, then of such Persons as had
been Choristers of the said Chapiter of *Southwell*, which Persons
should be then Inhabitant or abiding in the said University of *Cam-*
bridge; and IF NONE SUCH should be found able in the University
aforesaid, then the same Fellows and Scholars or Disciples to be
elected and chosen of such Persons that should be most singular in
Manners and Learning, of what Country soever they should be, that
should

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* P. 161. should be then abiding in the same University. Furthermore the same Master Fellows and Scholars covenanted and granted by the said Indenture unto the abovenamed Sir *Anthony Fitzberbert* and Doctor *Keton* and to the said Chapter their Heirs and Successors, that when the said two Fellows and two Scholars or Disciples of the Foundation of the said Doctor *Keton* or any of them should chance to *die or otherwise depart* from the said College and leaved or leased his or their Title or Profits of the same, that then immediately after that leasing leaving departing or ceasing, at the then next time of Election of Fellows or Disciples of the said College limited by the Statutes of the College of Saint *John* aforesaid, *other Fellow or Fellows* Disciple or Disciples, as the Case should require, should be *electd named and chosen* by the said Master Fellows and Scholars, ACCORDING to those then present Covenants and Agreements, according to such Ordinances or Will as the same Doctor *Keton* SHOULD thereof make and declare. And also it was covenanted and agreed by the said Indenture, that the said Master Fellows and Scholars of Saint *John* aforesaid, and also the Fellows and Scholars of the Foundation of the said Doctor *Keton*, at the Time of their Admission, should be *sworn to observe and keep* the Statutes and Ordinances that then were made or thereafter should be ordained and made by the said Doctor *Keton* for the Foundation of the said Fellows and Scholars; so that the said Statutes should be conformable with the Statutes of the *Foundress* of the said College. For the which all and singular the Premises well and truly to be observed and kept by the said Master Fellows and Scholars and their Successors in Manner and Form as is aforesaid, that is to say, *as well for the Elections and Admissions of the said Fellows* and Scholars and for their Finding, as for Wages yearly to be paid to the same, with all other Liberties Commodities and Profits likewise pertaining unto them, *as for all other Covenants and Agreements* with all and singular the Premises according to the Ordinance above rehearsed, the said Doctor *Keton* had contented given and paid to the said Master Fellows and Scholars, in Money Plate and other Jewels, the Value of four hundred Pounds Sterling. Further it was covenanted and agreed by the said Indenture, between the said Parties, for them and their Successors, that if the said Master Fellows and Scholars and their Successors *did fail in taking admitting or receiving of the said Fellows* and Scholars in any Time of Election next after the Avoidance, and * not chosen nor admitted into the said College according to the Ordinances and Agreements above rehearsed, or had not nor enjoyed not their full Commodities and Profits as is aforesaid, then the aforesaid Master Fellows and Scholars and their Successors should FORFEIT as well to the said Sir *Anthony Fitzberbert* and Doctor *Keton* as to the Chapter of *Southwell*, and to their Heirs and Successors, in the Name of a PENALTY or Pain for every Default made or no due Election of the said Fellows and Scholars

* Here seems to be an Omission or mistake of some words.

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Scholars or any of them, TWENTY SHILLINGS for every Month* P. 162.
that it should happen the said Fellows and Scholars not to be chosen nor admitted into the said College as is aforesaid, or restrained of any Profits Commodities or Easements as is aforesaid; and that then it should be lawful as well to the said Sir *Anthony Fitzberbert* and Doctor *Keton* on their Party, as to the Chapter of *Southwell*, and to their Heirs and Successors for their Party, into the Manors of *Marfete* and *Myllington* in the County of *York*, and into the Manor of *Little Markham* in the County of *Nottingham*, to Enter, and DISTRAIN for the same Twenty Shillings and the Arrears of the same for every Time or Times of Forfeiture, and the Distress to withhold until the said Twenty Shillings with the Arrearages of the same should be to them well and truly Satisfied Contented and Paid. Also the said Master Fellows and Scholars by the said Indenture Covenanted and Granted unto the said Sir *Anthony Fitzberbert* and Doctor *Keton*, that they the said Master Fellows and Scholars and their Successors, at every Time and Times during the Life Natural of the said Sir *Anthony Fitzberbert* and Doctor *Keton*, should give Notice and Knowledge to the said Sir *Anthony Fitzberbert* and Doctor *Keton* or to the longer Liver of them, within six Days, when and as often as it should fortune any of the said Fellowships or Disciplehips to be void or vacant; so that the said Sir *Anthony Fitzberbert* and Doctor *Keton* or the longer Liver of them might nominate and appoint other Fellow or Fellows Disciple or Disciples apt and able to have receive and take the said Fellowships or Disciplehips so then being void. And Whereas the said Doctor *Keton* did NOT at any Time, by his last Will or otherwise, MAKE or DECLARE any Statute or Ordinance, other than what was contained in the said above recited Indenture, of or concerning the said Fellowships called *Southwell Fellowships*, or of or concerning either of them; Nevertheless the Right Reverend *Matthias* by Divine Permission Lord Bishop of *Ely*, well knowing the Premisses, but contriving and intending to aggrieve and oppress the said Master and SENIOR Fellows of the College aforesaid, against the due Course of the Law of this Realm, and to Disinherit our Lord the King and his Crown, and to draw the Cognizance of a Plea which belongs to his Majesty's Temporal Courts and ought there to be tried discussed and determined, to another Trial before the said Lord Bishop, hath lately drawn into a Plea the said Master and Senior Fellows of the College aforesaid, before the said Lord Bishop, by a certain Inhibition Citation and Monition bearing Date the Twenty-ninth Day of *January* in the Year of our Lord One thousand Seven hundred and fifty-six, Reciting that "Whereas
" on the Part and Behalf of of the Reverend *Thomas Todington*
" Clerk, of the same College, Batchelor of Arts, it had been
" (with grievous Complaint) alledged and shewn to the said Lord
" Bishop, that the Reverend *John Newcome* Doctor in Divinity,

T t

" Master

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* P. 163. " Master of the said College, and the Senior Fellows of the same,
" *Unjustly and Unduly Proceeding in the Election of Fellows of the*
" said College, did on or about the Seventeenth Day of *March*
" last *Choose and Elect the Reverend William Craven, Bachelor of*
" Arts, into a Fellowship in the said College commonly called a
" *Southwell Fellowship*, founded by the Reverend *John Keton* Doctor
" in Divinity, Vacant by the Resignation of the Reverend *Theophi-*
" *lus Lindsey* Bachelor of Arts late one of the *Southwell* Fellows of
" the said College as aforesaid, and did REFUSE to elect and admit,
" at least did NOT admit and elect the said *Thomas Todington* into
" the said vacant *Southwell* Fellowship, notwithstanding the said
" *Thomas Todington* who was an *Inhabitant abiding within* the said
" College and *had been Chorister of the Church of Southwell* in the
" County of *Nottingham* several Years, OFFERED himself a Candi-
" date and PRAYED to be elected and admitted into the said Fellow-
" ship, and NO OTHER Chorister of the said Church of *Southwell*
" offered himself a Candidate for the said vacant Fellowship; And
" that he the said *Thomas Todington*, apprehending himself to be
" greatly injured and aggrieved by the pretended Election aforesaid
" and other pretended Proceedings of the said Master and Senior
" Fellows, as well by Virtue of their pretended Office as at the un-
" just Instigation Solicitation Procurement and Petition of the said
" *William Craven*, and justly fearing that he might be further in-
" jured and aggrieved thereby, had FROM the same and every of
" them, and ESPECIALLY from the said pretended Choice and Elec-
" tion of the Person of the said *William Craven* into the aforemen-
" tioned vacant Fellowship in the said College, so made or pre-
" tended to be made by the said Master and Senior Fellows, not-
" withstanding the said *Thomas Todington* offered himself a Candi-
" date and prayed to be Elected and Admitted into the said vacant
" Fellowship, and no other Chorister of *Southwell* offered himself a
" Candidate for the same; and FROM their refusing to elect and ad-
" mit, at least not Electing and Admitting the said *Thomas Toding-*
" *ton* into the said vacant Fellowship; and from all and every thing
" that did or might follow therefrom; and from all and singular
" other Grievances Nullities Iniquities and Errors in Proceeding;
" and from All other Acts Facts and Things illegally done, that
" might be collected from the pretended Proceedings of the said
" Master and Senior Fellows in the said pretended Election; To
" the said Lord Bishop, VISITOR OF THE SAID COLLEGE,
" rightly and duly APPEALED, and of and concerning the Nullity
" and Iniquity of all and singular the Premises aforesaid had equally
" and alike principally alledged and complained; " And also reci-
" ting That " whereas the said Lord Bishop, rightly and duly pro-
" ceeding, had at the Petition of the Proctor of the said *Thomas*
" *Todington* (Justice so requiring,) Decreed the Inhibition Citation
" and Monition thereunder written, The said Lord Bishop did there-
" fore

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“ fore thereby authorize impower and strictly injoin and command * P. 164.
“ all and singular Clerks and Literate Persons whomsoever and
“ wheresoever, jointly and severally, that they should *inhibit or*
“ *cause to be inhibited*, personally, if they conveniently could so do,
“ otherwise, by publickly affixing the said Monition for some Time
“ on the outward Door of the Chapel belonging to the said College
“ and by leaving there affixed a true Copy thereof, the said *Master*
“ *and Senior Fellows*, and also the said *William Craven*, in Special,
“ and all others in General, who by Law were required to be In-
“ hibited in that Behalf ; All and every of whom, the said Lord
“ Bishop also by the Tenor of the said Monition did inhibit and in-
“ join, that they nor any or either of them should innovate or at-
“ tempt or cause or procure to be done innovated or attempted
“ any thing to the Prejudice of the said *Thomas Todington* or his said
“ Cause of Appeal or the Authority or Jurisdiction aforesaid of the
“ said Lord Bishop, pending the said Cause of Appeal and Com-
“ plaint and so long as the same should remain undecided before
“ the said Lord Bishop, so that the said *Thomas Todington* the Ap-
“ pellant might have free Liberty and Power (as in Justice he ought)
“ to prosecute that his said Cause of Appeal and Complaint, under
“ Pain of the Law and their Contempt ; And also that they should
“ in like Manner CITE the said *Master and Senior Fellows* and also
“ the said *William Craven*, or cause them to be peremptorily cited to
“ APPEAR before the said Lord Bishop at his Mansion House com-
“ monly called *Ely House* situate in the Parish of Saint *Andrew Hol-*
“ *bourn* in the County of *Middlesex*, on Monday the ninth Day of *Fe-*
“ *bruary* then next ensuing, between the Hours of Three and Six in
“ the Afternoon of the same Day, then and there to ANSWER to
“ the said *Thomas Todington* in his said Business of Complaint; and
“ further to do and receive as to Law and Justice should appertain,
“ under Pain of the Law and their Contempt ; And Moreover that
“ they should Monish or cause to be monished Peremptorily, in
“ like Manner, the said *Master and Senior Fellows and Officers* of
“ the said College in Special, and all Others in general, that they
“ some or one of them should *transmit or cause to be transmitted*
“ to the said Lord Bishop, at the Time and Place aforesaid, All
“ and singular the Statutes Acts Original Exhibits Books Indentures
“ Miniments Instruments and Proceedings in or any wise concern-
“ ing the said pretended Election or the said Cause of Appeal and
“ Complaint, and more especially the Statutes Books and Inden-
“ tures in the thereunderwritten Schedule mentioned, under Pain
“ of the Law and their Contempt ; And what they should do in
“ the Premises, they should duly certify to the said Lord Bishop,
“ together with the said Monition : And the said Lord Bishop hath
“ annexed the following Schedule to the said Monition, (To wit)
“ The Original Statutes of the College given by Queen *Elizabeth*
“ or an authentic Copy thereof, The Indenture bearing Date the
“ twenty

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* P. 165. “ twenty seventh Day of *October* in the twenty second Year of the
“ Reign of King *Henry* the Eighth relating to Doctor *Keton*’s or
“ the *Southwell* Fellowships founded in the said College, The Book
“ or Books wherein the Election of Fellows and the Proceedings
“ thereon are entered, The Book of Battles or Buttery Book for
“ the Months of *February* and *March* last ;” as by a Copy of the
said Monition, and Schedule thereto annexed, here in this Court
read, more fully appears. And although the said Master and Senior
Fellows of the said College *have pleaded and alledged* all and singular
the Matters aforesaid by them above suggested and alledged, before
the said Lord Bishop, in their Discharge of and from the Premises
aforesaid ; and have *offered to prove* the same by undeniable Testi-
mony and Proof ; Yet the said Lord Bishop hath wholly *REFUSED*
to receive or admit the said Plea Allegation and Proof, and them by
Definitive Sentence of the said Lord Bishop, in the said Premises,
with all his Might doth endeavour and daily labour to condemn ; in
great Contempt of our Lord the now King and his Laws, and to
the great *Damage and Injury* of the said Master and Senior Fellows
of the said College : All which said Premises the said Master and
Senior Fellows of the said College are ready to verify and prove, as
this Court here shall direct. Wherefore the said *Master and Senior*
Fellows of the said College, imploring the Aid and Munificence of
this Court here, pray Relief and His Majesty’s *Writ of PROHIBI-*
TION to be directed to the said Lord Bishop in this Behalf, *to pro-*
hibit him that he do not any further hold Plea before him, touching
the Premises aforesaid or any Part thereof. And it is granted to
them, &c.

The Deed.

Suppressio Domus Sancti Johannis in Cantab.

THIS Indenture made the twelfth Day of *December* in the
second Year of the Reign of our Sovereign Lord King *Henry*
the Eighth, Between the Reverend Father in God *Richard* Bishop
of *Winchester* *John* Bishop of *Rochester* Sir *Charles* *Somerfet* Knt.
Lord *Herbert* Sir *Thomas* *Lovell* Knight Sir *Henry* *Marney* Knt. Sir
John *Saint* *John* Knight *Henry* *Horneby* Clerk and *Hugh* *Ashton*
Clerk, Executors of the Testament of the excellent Princess *Margaret*
late Countess of *Richmond* and *Derby* and Grand-Dame to our said
Sovereign Lord King *Henry* the Eighth, on the one Party, and the
Reverend Father in God *James* Bishop of *Ely* and ORDINARY of the
House or Priory of Saint John in Cambridge, on the other Party,
Witneseth, That Whereas our Holy Father the Pope by his Bulls
under Ledd, for the Increase of Virtue Learning and Doctrine and
Preaching of the Word of God, and to the establishing of Christ’s
Faith

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Faith, and for divers Considerations expressed in the said Bull, Hath * P. 166.
suppressed extinguished and determined the Foundation and Religion of the *said House and Priory*, by the Royal Assent of our said Sovereign Lord the King that now is, by his Letters Patents under his Great Seal, and also by the *Assent and Agreement* of the said Reverend Father *James Bishop of Ely*, confirmed by the Prior and Convent of the Cathedral Church of *Ely*, as in the said Bulls Letters Patents and other Writings thereof made, more plainly appeareth; It is now covenanted betwixt the said Parties and fully coneluded, and by the *said Reverend Father Bishop of Ely* granted, that *he*, for the better Execution and Assurance of the Premisses, shall before the sixteenth Day of *January* next ensuing after the Date of these Presents, avoid and cause to be avoided and removed out of the said House and Priory, all such and as many religious Persons as now be incorporated and possessed in the said House and Priory of Saint *John*, or that can or may pretend or claim any Right Title or Interest in or to the said House or Priory or to the Possessions thereof, by reason of their Profession or Incorporation within the same; and utterly make void and dispose the said religious Persons from the said House and Priory, and all such Right Title Claim and Interest as they or any of them have pretended or claim to have within the same House and Priory or to the Possessions or to any thing thereunto belonging; and also cause the same religious Persons and every of them, by Authentic Instrument, in sure and sufficient Form to be made, to resign and renounce all such Right Title Claim and Interest as they or any of them have or in any manner of wise may have to the said House or Priory or to the Possessions or to any thing thereunto appertaining; And that the same Bishop shall translate or cause to be translated all the same religious Persons into other House or Houses of the same Religion, and cause them and every of them clearly to renounce relinquish and leave the same House and Priory and all the Possessions thereof, and clearly to depart and to be utterly excluded from the same for ever, and to be really and effectually accept and incorporate in some other House or Houses of the same Religion; and cause the said House and Priory of Saint *John* and the Foundation and Corporation thereof to be clearly dissolved and determined for ever, before the said sixteenth Day of *January* next ensuing. And also the said *Bishop of Ely* covenanteth and granteth to the said Executors, by these Presents, that *he*, before the Feast of the Purification of our Lady next ensuing, and at all Times after, when he shall be reasonably required by the said Executors or any of them, shall make and cause to be made all such Grants and Assurances TO THE SAID EXECUTORS their Heirs and Assigns, OF the said House and Priory of Saint *John*, and of all the Manors Lands Tenements and Possessions and all other that belongeth and at any time belonged thereunto, To have and hold to the same Executors their Heirs and Assigns, as shall be advised by the

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* P. 167. Learned Counsel of the same Executors, their Heirs and Assigns or any of them, at their Costs and Charges ; and *cause* all the same Grants and Assurances *to be confirmed* by the Prior and Convent of the said Cathedral Church of *Ely*, by their Deed and Deeds sealed with their Common Seal, in such wise as shall be advised by the said Executors or any of them ; so that the said Executors or some of them, by Reason and Authority of the said Bulls and of the said Letters Patents and other Premises, may make lawful perfect and sure Translation of the said House and Priory of Saint *John* and the Possessions thereof, unto a perpetual COLLEGE, of a perpetual Master and Fellows, and there *erect found and establish a perpetual COLLEGE*, of a perpetual Master and Fellows, *according to the Will Mind and Intent of the said Princess, and according to the Ordinances and Statutes of the said Executors*, thereof to be made by Virtue and Authority of the said Bulls and Letters Patents, there perpetually to endure : And on this, the said *Bishop of Ely* covenanteth and granted to the said Executors, by these Presents, that the same Bishop and his Successors, and also the said Prior and Convent of the said Cathedral Church of *Ely* and their Successors, shall at all times do and cause and suffer to be done all things necessary and requisite for the said Translation and for the Foundation and establishing of the said College for ever to endure, as by the Learned Counsel of the said Executors or any of them shall be advised, at the Costs and Charges of the said Executors. And the said Executors, by these Presents, *permit and grant to the said Reverend Father Bishop of Ely*, that the said Master and Fellows, within one Month next after that they shall be founded and have real and corporal Possession of the same House and Priory and of the Manors Lands and Tenements and Possessions of the same, *shall grant*, by their sufficient Writing under their Common Seal, for the Exhibition and Finding of the said religious Persons during their Lives, to every of them or to other Persons at their Nomination, an Annuity of *o l. 13 s. 4 d.* by the Year, to be had and perceived to every of them during their Lives, out of the said House, Manors Lands and Tenements, at Two Feasts of the Year, that is to say *Easter and Michaelmas*, by even Portions, with a sufficient Clause of Distress in the same House and in all the said Manors Lands and Tenements, for sake of Payment of the same. And the said Executors covenant and grant to the said Reverend Father in God Bishop of *Ely*, by these Presents, that after the said Translation of the said House and Priory and Foundation of the said College, the same Executors, in their Statutes and Ordinances thereupon to be made and ordained for the Ordering and Continuance of the same College, *shall ordain and establish* (among other things) that the *Jurisdiction Ordinary of the same College* and of the said Churches and Chapels thereunto belonging *shall appertain and belong to the same Bishop and his Successors for evermore*, and that the Master and Fellows shall pray for the good Estate

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Estate of the said Bishop during his Life, and for his Soul after his Decease, *as the SECONDARY Founder* Benefactor and Partner in the said Holy and Meritorious Work, And also for the good Estate of all his Successors in Time to come Bishops of *Ely*, during their Lives, and for the Souls of his Predecessors Patrons and Founders of the said House and Priory, and for the Souls of his Successors *as secondary Founders of the said College*; And on that, the said Executors shall provide and make Statutes and Ordinances of the said College; in such Manner that there shall not be any Ambiguity in the Elections of the Masters and Fellows of the said College. And also the same Executors granten to the said Reverend Father in God Bishop of *Ely*, by these Presents, that the same Reverend Father in God, during his Life, shall name and choose three apt and able Persons, Scholars; And his Successors, after his Decease, one apt and able Person, Scholar; to be made Fellows of and in the said College, and there to be accepted and admitted Fellows of the same College, at their Nomination and Election; and that to be renewed and used, as oft as the Place of any of them shall happen to be void: And on that, the said Executors granten to the said Reverend Father in God Bishop of *Ely*, that they shall ordain and provide in the said Statutes, that the Master and Fellows of the said College shall be bounden to pray for all singular Persons as well alive as dead, for the which the said religious Brethren of the said House and Priory were bound to pray, in likewise as the said Executors have before this time promised and covenanted with the same Reverend Father in God to be done. In Witness whereof, the said Parties to these Present Indentures interchangeably have set their Hands and Seals, the Day and Year abovewritten.

The Confirmation of the above Indenture, by the
Prior and Convent of the Cathedral Church of *Ely*.

AND We the Prior and Convent of the Cathedral Church of *Ely*, having and taking these present Indentures and all and singular Premises contained therein, freely agreed accept and approve; And the Indenture, and all the same Premises contained and specified therein, unto the said Executors their Heirs and Assigns, for Us and our Successors, ratify approve and confirm, by these Presents, (Rents Consuetudes and *all other Rights* of our Monastery and Priory of *Ely*, to Us and our Successors, in all Things, always *saved and reserved*.) In Witness whereof, We the said Prior and Convent to these Presents have set our Common Seal. Given in our Chapter House, the fifth Day of *January* in the Year of our Lord God 1510.

EXTRACTS

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* P. 169.

EXTRACTS from Bishop *Fisher's* Statutes.

Statuta pro Collegio Divi Joh̄is Evangelistæ infra Gimnasium Cantabrigiense sito.

Preamble—

UT constet universis qui Statuta præsentia lecturi sunt, quânam Auctoritate sancita fuerint, hoc Frontispicio locandum censuimus Instrumentum quoddam Sigillis et Subscriptionibus omnium Executorum præstantissimæ Viraginis Dominae Margaretæ Richmondia, Fundatricis Collegij divi Johannis Evangelistæ in Cantabrigia: Quo Instrumento per eosdem Executores confecto, planè constat plenariam Auctoritatem mihi Johanni Episcopo Roffensi traditam, pro condendis Legibus et Statutis, quibus tam Magister quam Socij et Scholares pariter et Discipuli teneantur obedire. Cujus quidem Instrumenti Tenoris est, qui sequitur.

“ Universis Christi fidelibus præsentis literas inspecturis, Ricardus Winton. Episcopus Carolus Somerset Comes Wigornia Thomas Lovel Miles Henricus Verney Miles Johannis Seynt John Miles Henricus Horneby et Hugo Assheton Clerici, Executores Testamenti et ultimæ Voluntatis nuper excellentissimæ Principissæ Margaretæ Comitissæ Richmondia et Derbiæ, Matrisque et Avia duorum Regum nimirum Henrici Septimi et Octavi, salutem in Domino, et fidem indubiam præsentibus adhibere. Quum sit optandum potius ut non erigerentur Collegia, quam ut erecta malè gubernarentur, nos Executores antedicti, qui Sumptibus et Impensis præfatæ Principissæ Collegium Sancti Johannes in Cantabrigia extrui curavimus, simul et dotari, magno Affectu cupimus id ipsum justis Legibus sanctisq; administrari Sanctionibus. Verùm quoniam omnes Nos unà adesse commodè non possumus, ut vel novam Electionem Sociorum in Collegio prædicto faciamus vel Sociis ita electis Leges et Sanctiones justas ac sanctas exhibeamus, denique Juramentum ab eisdem exigamus pro Legibus hmoi inviolabiliter observandis, Idcirco *nostras Vices committimus* Reverendo Patri *Johanni Roffen. Episcopo*, ut ille tam nostrâ quàm suâ Auctoritate possit numerum Sociorum ibidem augere, *Magistroq; et Sociis omnibus Statuta salubria nostro Nomine exhibere*, atque ab eisdem Juramenta exigere pro eorundem inviolabili Observatione, Recusantes verò (si qui fuerint) amovere, violantes corrigere, ac cætera omnia et singula peragere quæ pro salubri Gubernatione ejusdem Collegij sibi opportuna visa fuerint, æquè ac si nos illic omnes præsentis essemus: Quæ omnia et singula Universitati significamus per Præsentis. In quorum omnium et singulorum Fidem ac Testimonium, Sigilla nostra præsentibus

“ apposuimus,

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“ apposui. Dat. vigesimo Die Mensis Martij Anno Domini * P. 170.
“ Millesimo quingentesimo quinto decimo.”

Ad Cultum optimi maximi Dei, ad honorem divi Johannis Evangelistæ, ac mox ad Fidei Christianæ Incrementum, *Nos Johannes Roffen. Episcopus*, unus Executorum ultimæ Voluntatis Nobilissimæ Viraginis Dominæ Margaretæ Richmondiaë Derbiæque Comitissæ Genitricis et Aviaë duorum Regum Henrici septimi pariter et octavi, *Nomine et Autoritate cæterorum Co-Executorum* ejusdem Comitissæ, nempe Ricardi Wintoniensis Episcopi Caroli Somerset Comitis Wigorniaë Thomæ Lovell Henrici Verney Johannis Seynt John Equitum Henrici Horneby Hugonis Ashton Clericorum, *Leges et Statuta quæ sequuntur* EDIDIMUS, Magistroq; et Sociis ac Scholaribus Collegij Divi Johannis Cantabrigiæ *tradidimus*, quatenus eisdem omnino se conforment, tam hi qui jam sunt Magister Socij et Scholares, quam eorum Successores quotquot futuri sint in perpetuum.

De Electione Magistri.

Qd si tunc per * Viam Spiritus sancti concordibus animis, Nemine * Vim. qu. dissidente, in quempiam ejusmodi Virum consenserint, qualis in Statuto ante lecto descriptus est; aut si major Pars omnium super aliquo ejusmodi consenserit; Volumus et statuimus * q'vis absque Mora, (nullâ prorsus Licentia Patroni Ordinarij *Visitatoris* aut alterius cu-<sup>* Qu (forti-
tan, quod is.)</sup> juscunque jurisdictionem ordinariam prætendentis, nec Cessionis aut Resignationis hujusmodi eis vel eorum alicui * exhibeasne, aut ab eorum aliquo ejusdem Approbatione expectatâ aut requisitâ,) per Præsidentem Magister Collegij pronuncietur, his Verbis—

* Qu. vide post pa. 182. cap. 2. Regi-
næ Elizabe-
thæ, de elec-
tione magistri.

De juramento Magistri.

Ego N. in Magistrum Collegij Sancti Johannis Evangelistæ in Universitate Cantabrigiæ nominatus electus et præfectus Juro, tactis et inspectis per Me hiis sacro-sanctis Evangeliiis, dictum Collegium omnia Beneficia Terras Tenementa Possessiones Reditus spirituales et temporales Jura Libertates Privilegia et Bona quæcunq; ejusdem, nec non omnes et singulos Socios et Scholares et Discipulos ipsius Collegij, juxta Statuta et Ordinationes dicti Reverendi Patris Domini Johannis Fisher Roffen. Episcopi, absque Personarum Scientiarum Facultatum Generis et Patriæ acceptione quacunque, pro mea virili regam custodiam dirigam et gubernabo, et per alios regi custodiri dirigi et gubernari faciam; Nec ero factiosus, magis favens uni quam alii, contra Justitiam et Fraternalitatis Amorem; nec eorum alicui Gravamina vel Molestias injustè inferam; Correctiones quoq; Punitiones et Reformationes debitas justas ratio-

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* P. 171. nobiles de quibuscunq; delictis Criminibus et Excessibus Sociorum et Scholarium et Discipulorum dicti Collegij, quoties ubi et quando opus fuerit, secundum Rei Qualitatem et Quantitatem omnemq; Vim Formam et Effectum Ordinationum et Statutorum per dictum Reverendum Patrem editorum, absq; Favore aut Odio Affectione Consanguinitatis Affinitatis aut aliâ quacunq;, diligenter et indifferenter faciam et procurabo: Et si hujusmodi Correctiones Punitiones et Reformationes ut præfertur debitè et justè exequi non potero, propter Metum et Potentiam seu Multitudinem Delinquentium, ipsorum Nomina et Cognomina, cum Qualitate et Quantitate Delictorum et Excessuum hujusmodi, quam citò potero, intra Mensem, *Domino Episcopo Eliensi qui pro tempore fuerit*, aut Domino Cancellario Universitatis vel ejus Vicem-gerenti, denuntiabo et revelabo, et *per eos* hujusmodi Correctiones Punitiones et Reformationes juxta Statuta et Ordinationes Collegij in omnibus solerter et celeriter fieri procurabo.

Item quoties Electio vel Assumptio alicujus Socij ac Scholaris vel Discipuli in Collegium prædictum fuerit facienda, intendam et enitar ut solùm tales eligantur et assumantur quos secundum Conditiones et Qualitates in Statutis dicti Collegij expressas habiles et idoneos reputaverim, et quos in Virtutibus et Scientiis ad Honorem et Utilitatem Collegij prædicti plus posse proficere et profecturos crediderim, sine Personarum vel Patriæ Acceptione, Amore Favore Odio Invidia Timore Prece et Pretio post positis quibuscunq;. Item si ab Officio meo amovear, aut si spontè cessero, Bona Collegij per Me recepta aut apud me remanentia, Præsidenti et Thesaurariis Collegij aut (Præsidente absente) Socio maximè seniori in Universitate præfenti et dictis Thesaurariis, si commodè potero continuò, fin minùs saltem infra quindecim Dies ex tunc prox. sequen. sine Contradictione seu Diminutione, per Inventarium inde inter me et illos, sub Testimonio et Subscriptione eorundem et meâ, restituum.

Item, si per me seu Occasione meâ, aliqua Materia *Dissensionis* Iræ vel Discordiæ in dicto Collegio (quod absit) *suscitata fuerit*, et per Præsidentem Decanos vel Thesaurarios et duos alios ex septem Collegij Senioribus finis rationabilis seu placabilis infra quinq; Dies factus non fuerit, tunc *Cancellarii Universitatis Cantabrigiæ* qui pro Tempore fuerit, *præpositique Collegii regalis*, ac *Magistri Collegij Christi* in eadem Universitate, si tunc infra eandem præfentes fuerint, ac, dicto Cancellario præposito aut Magistro extra Universitatem Agentibus, absentis aut absientium Vices in Universitate gerentium, unâ cum totidem ex prænominatis quot in Universitate præfentes fuerint, *Ordinationi Arbitrio Decreto et Auctoritati* personalliter et effectualiter me submittam: Et quicquid duo ex illis pro tempore, secundum Formam infra limitatam pro tempore consulti, arbitrati fuerint statuerint ordinaverint vel diffinierint in eâ

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Parte, id omne fideliter observabo et iisdem cum effectu parebo,* P. 172.
fine Contradictione quacunque, cessantibus Provocationibus Appel-
lationibus Querelis Exceptionibus et aliis Juris et Facti Remediis
quibuscunq; quibus omnibus et singulis in Vim pacti renuncio in
his Scriptis.

Item, omnia et singula Statuta et Ordinationes dicti Collegij per
dictum Reverendum Patrem Dominum Johannem Roffen. Episco-
pum, Executorem ultimæ Voluntatis Domine Margarete Comi-
tissæ Richmondiæ et Derbiæ, edita, et per eum dum Superstes fuerit
edenda, quantum me concernunt, secundum literalem et gramma-
ticalem Sensum et Intellectum inviolabiliter tenebo exequar et ob-
servabo, et quantum in me fuerit faciam ab aliis observari.

Itemque *nulla Statuta seu Ordinationes Interpretationes Mutationes*
Injunctiones Declarationes aut Expositiones vel Glossas aliquas, præ-
sensentibus Ordinationibus et Statutis vel qualitercunq; vero Sensui et
Intellectui eorundem repugnantes vel repugnantia derogantes vel de-
rogantia contrarias vel contraria, per quemcunq; seu quoscunq;
alium vel alios quam per Reverendum Patrem Dominum Johannem
Roffen. Episcopum prædictum faciendas vel facienda, quomodolibet
scienter acceptabo, vel ad ea consentiam, aut ipsa aliquialiter admit-
tam, nec eisdem parebo ullo tempore, vel intendam, nec illis vel il-
lorum aliquo ullo Modo utar in Collegio prædicto vel extra, tacite
vel expresse; sed eis et eorum cuilibet contradicam et etiam resistam
expresse, ipsaq; fieri viis et modis omnibus quibus potero obstabo et
impediam.

Item, Juroque, quantum in Me fuerit et quatenus meam per-
sonam concernat aut concernere poterit, me laudatas ac probas hujus
Collegij Consuetudines *observaturum*, unà cum aliis Ordinationibus
per Magistrum et Socios ac Scholares editis pro Sustentatione quo-
rundam Sociorum ac Discipulorum, juxta Tenorem cujusdam Ju-
ramenti quo Magister olim et Socij se devinxerunt *oratu*ros tam pro
dicto Domino Johanne Roffen. Episcopo quam Henrico Ediall Archi-
diacano Roffen. Hugone Ashton Archidiacano Eboracensi Johanne
Ripplyngham in sacra Theologia Doctore et Roberto Dokket in ea-
dem Baccalaureo ac Marmaduco Constable Equite aurato et Roberto
Symfon in Artibus Magistro cæterisq; qui privatas aliquas aut Soci-
orum aut Discipulorum foundationes fecerint aut in posterum facturi
sint; simulq; et curabo, quantum in me fuerit, à cæteris omnibus
tam Sociisquam Discipulis idem fieri; neque extortas eorundem In-
terpretationes (per quemcunque factas) admittam, aliter quam Sensus
eorum apertus patitur et mea Conscientia magis conformem indi-
cabit *animo Conditoris.*

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* P. 173.

De Sociorum Qualitatibus.

Nunc itidem et Leges dabimus residuo Corpori; quod nimirum ex Sociis, quocunq; numero eos fore contigerit, tanquam ex potioribus et solidioribus Membris, volumus integrari. Pro Fundatrice verò, tametsi Rex illustrissimus, in Carta Licentiæ suæ quam Avia suæ, Dominæ Fundatrici, concessit, mentionem fecerit de quinquaginta Sociis ac Scholaribus, Nos tamen, qui ob Subtractionem reddituum Annuorum ad Valorem quadringtarum Librarum, ipsum numerum implere non possumus, quantum ad præsentem Ordinationem spectat (si fieri protest) octo super viginti deputari volumus et ordinamus.

De Sociorum Electione, ac ipsius Circumstantiis.

Et quò possit exactior fieri Sociorum Delectus, convocari volumus et statuimus, per Magistrum vel (ipso absente) præidentem, cunctos Socios in Universitate præsentem, primo Die Lunæ cujusq; Quadragesimæ, simul et comones fieri “ quatenus quisq; solitam Inquisitionem faciat de Juvenibus quibusdam, tam Moribus quam “ Eruditione magis idoneis, qui in Sociorum numerum cooptentur; “ et ut repertorum Nomina, simul cum Nomine Comitatus quo “ quisq; fuit oriundus, in Scedula conscribatur, unà cum aliis “ tibus quibus ipse Juvenis fuerit præditus;” Ad quam Inquisitionem teneri singulos volumus, in Vim Juramenti sui: Cujus autem Nomenclatura non ante septem Dies Electionis futuræ, tradita magistro fuerit aut ejus Vice-gerenti quando Magister aberit, hunc, pro eâ Vice, ineligibilem Pronunciamus. Porro, Delectum hunc, quoties eveniet, celebrari volumus et ordinamus quâq; Die Lunæ quæ proximè sequitur Dominicam Passionis: Quo Die Magister et Socij cuncti præsentem conveniant in Sacellum, quum Horologium insonuerit octavam; et illic, primùm lecto Statuto de Cooptandorum Qualitatibus, Magister primùm, deinde reliqui per Ordinem Socij, jusjurandum quod sequitur, tactis Sacris Evangeliiis, præstabunt. “ Ego N. N. Deum testor et hæc sancta ipsius Evangelia, me ne- “ minem in Socium hujus Collegij electurum, *nisi quem* juxta Sta- “ tutum antelectum me *Conscientia magis idoneum indicabit*; neq; “ istud faciam Pretio vel Mercede quâvis, à quopiam aut datâ aut “ expectatâ.” Juratis itaq; singulis, fiat è vestigio Scrutinium, per Magistrum et duos è Sociis maximè Senioribus, (sic tamen ut hi non fuerint de Numero Septem Seniorum conscriptorum,) qui priùs etiam tactis sanctis Dei Evangeliiis promittant “ se veraciter “ et absq; dolo Scrutinium ipsum pro futurâ Sociorum Electione “ tractaturos,

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“ tractaturos, et secretum penitus habituros, neq; Signo aut Nutu * P. 174.
“ aut alio quovis pacto rem indicaturos.” Auditis ergò singulorum Votis et Suffragiis, illum vel illos in Socium vel Socios dicti Collegij Magister pronuntiabit, in quem vel in quos ipse Magister, cum majori aut æquali parte Sociorum, consenserit. Et si Magister, cum majori aut æquali parte Sociorum, in aliquem aut aliquos eligendum vel eligendos haudquaque convenerint, sed in eâ Dissensione triduum ab incepto Delectu perseveraverint, tùm Volumus ut hujus Negotij diffinitio, pro hac Vice, ad septem conscriptos Seniores referatur: itaque pro his de quibus non est consensus factus, Electio septem illis Senioribus deferenda sit, ad hunc Modum ut sequitur. Quarto igitur Die post inchoatam Electionem conveniant iterum omnes in Sacellum, et primitus, per septem ipsos Seniores Juramento præstito “ quòd illum vel illos, de quibus fit diffidium, in Socium vel Socios cooptabunt, qui suis Conscientiis “ magis videbitur aut videbuntur idonei;” Præstito igitur hoc Juramento, fiat alterum iterum Scrutinium, in quo Magister et duo prædicti Scrutatores Suffragia Septem illorum Seniorum scrutabuntur, et is vel ij in quem vel quos major Septem Seniorum Pars consenserit, pro electo vel electis habeantur, atq; ita a cæteris acceptentur. Quòd si forte Conscientiis eorum septem Seniorum non videatur inter eligendos aliqua Disparitas, aut forsitan inter se major eorum Pars haudquaquam consenserit, tùm Volumus ut is vel ij qui à Magistro prius nominatus aut nominati fuerant, pro Socio vel Sociis protinus declarabitur aut declarabuntur. Provisò ut neque in hac Electione neq; aliâ quacumq; cujuscumq; Personæ infra dictum Collegium faciendâ, * suam Vocem aut Suffragium alterius Personæ cujuscumq; Arbitrio et Dispositioni quovis Modo committat, aut incertam Personam aut pro incerto Comitatu vel Diocesi sub Disjunctione vel Conditione quovis Modo nominet aut eligat: contra faciens, et Suffragium deinde suum et etiam dicti Collegij Societatem, ipso Facto, ex tunc imperpetuum amittat. Nec liceat, sub pœna Perjurij, cuique ex illis Scrutatoribus, nomina aliorum eligentium, alii cuiquam, quovis modo per se vel per interpositam Personam Nutu Verbo Signo vel Scripto, ante completam et publicatam Socij Electionem, ostendere.

* Here is an omission of the nominative case to committat; viz. “ Aliquis Socius,” or “ Aliquis ex Electoribus.”

De Morum Honestate servandâ, et Dissentionibus sedandis.

Quòd si inter Magistrum et alium aut alios hujus Collegii Socios, aut illius Causa, aliqua Materia Dissentionis Iræ Rixæ vel Discordiæ in dicto Collegio suscitata fuerit, et per Magistrum Decanos et majorem partem Septem Seniorum Finis rationalis seu placabilis infra octo Dies proximè sequentes factus non fuerit, tunc Volumus ut

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* P. 175. Partes dissentientes, Virtute Juramenti sui, triduum post illos octo Dies, duos Socios eligant, qui electi, in sui Virtute Juramenti, infra biduum post eorum ad hoc Electionem et deputationem, *Præfectum Collegij Regalis, et Magistrum Collegij Christi, et Magistrum sive Custodem Collegij divi Michaelis*, aut dictis Præfecto Magistro et Custode vel eorum aliquo extra Universitate agentibus, tunc eorum Vices Absentium in dictis Officiis infra Universitatem gerentes, ac etiam reliquos prænominatos siqui fuerint in Universitate præsentés, adeant; et eisdem hujusmodi Dissensionis Causam sive Materiam, in Scriptis significant et referant: Et quicquid *duo ex illis*, pro tempore consulti, *arbitrati fuerint et decreverint*, illi omnes *pareant* et in sui Virtute Juramenti *obediant*.

De Modo procedendi contra Magistrum &c.

His Ordine dispositis, ad errata quæ accedere possunt pervenimus, adhibitori quæ poterimus Remedia, incipientes a Magistro ut Duce et Principe, quo bono et provido ut nihil est utilius, ita imprudenti inepto indigno criminoso nihil est detestabilius. Quo circa statui-
mus ut Magister quicumq; propter Terrarum Tenementorum Reddi-
tuum Possessionum spiritualium seu temporalium sua Culpa Diminu-
tionem seu Alienationem, vel propter Detractionem Oblationum
Alienationem illicitam Bonorum et Rerum ipsius Collegij infamiam
incontinentiamq; notabilem Negligentiam intolerabilem Homici-
dium voluntarium aliamve Causam enormem ipsum Magistrum
omninò reddentem criminaliter irregularem vel aliter inhabilem,
nec non propter infirmitatem infectivam et contagiosam perpetuam,
cujus occasione non poterit absque Scandalo hujusmodi Officium
exercere, ab eo penitus amoveatur: Ad cujus Amotionem hoc modo
procedatur; videlicet, ut statim, vel saltem infra quindecim dies
postq; aliquod Præmissorum commiserit vel in eorum aliquod in-
ciderit, primò per Præsidentem, assistentibus ei aliis duobus Offi-
ciariis Clavi-geris et quatuor aliis Sociis ex Septem Senioribus dicti
Collegij, vel saltem cum Assensu et Assistentia duarum tertiarum
Partium omnium Sociorum dicti Collegij (sic quòd inter eos sint
quatuor Seniores ex Septem electi,) vel, Præsidente nolente aut neg-
ligente, per Decanum Theologiæ cum prædictorum Assistentia,
moveatur Magister ut suadeatur ad voluntariè recedendum ab Offi-
cio. Quòd si sponte infra triduum cedere noluerit, tunc infra octo
Dies post hujusmodi Monitionem, Præsidents, Assensu et Testimo-
nio omnium Sociorum dicti Collegij vel saltem omnium prædictorum
modo aliquo prædicto sibi in Magistri Monitione Assistentium, vel,
ipso nolente aut negligente, dictus Decanus Theologiæ, cum As-
sensu et Testimonio prædictorum, DENUNCIABIT Domino EPIS-
COPO ELIENSI, aut, eo in remotis agente, Vicario in Spiritualibus
generali,

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generali, seu (Sede vacante) *Custodi* in Spiritualibus, EJUSDEM, per * P. 176. duos aut tres Socios ipsius Collegij Seniores, cum literis aliquo Sigillo authentico ac Signo et Subscriptione alicujus Notarij publici signatis, vel saltem loco Sigilli authentici Subscriptione dicti Præsidentis vel Theologiæ Decani et prædictorum Assistentium ac Notarij Publici Signo communitis, Causas Defectus Crimina Excessus vel Enormia Magistri continentibus. Provisio quod omnes hujusmodi Assistentes et Testimonium perhibentes, prius tactis sacro sanctis Dei Evangeliiis, coram Præsidente aut Decano Theologiæ, ipso primum id coram eis præstante ac deinde à singulis illorum exigente, jurabunt “ quod non per Invidiam Malitiam Odium vel Timorem “ ipsius Magistri, Amorem vel Honorem alicujus promovendi ad “ illud Officium, nec per Conspirationem Æmulorum aut Con- “ fæderationem, nec per Procurationem alicujus vel aliquorum, nec “ Prece aut Pretio aut alio quocunq; Modo illicito inducti, sed “ pro bono Zelo et Utilitate prædicti Collegij et pro utiliori et con- “ venientiori Regimine ejusdem et Honore, Testimonium illud “ perhibuisse.” EPISCOPUS VERO ELIENSIS, vel, ipso in remotis agente, SUUS VICARIUS in Spiritualibus Generalis, aut (Sede Eliensi vacante) CUSTOS SPIRITUALITATIS EJUSDEM, de Causis criminosis Criminibus Excessibus et Defectibus contra dictum Magistrum expositis, SUMMARIE et de plano et EXTRA-JUDICIALITER COGNOSCAT: et si, per Informationes sufficientes ministratas, hujusmodi suggesta quæ ad dicti Magistri amotionem sufficere debeant, *recipiat esse* VERA, statim, aut saltem infra triduum proximè sequuturum, *ipsum* AB OFFICIO suo et ab ADMINISTRATIONE sua AMOVEAT sine ulteriori Dilatione; dicti quoq; Collegij Sociis DENUNCIET et INJUNGAT ut ad Electionem novi Magistri liberè procedere valeant et debeant, juxta Formam in Statuto superius expressam; CESSANTIBUS APPELLATIONIS RECUSATIONIS QUERELÆ AUT CUJUSCUNQUE ALTERIUS Juris aut Facti REMEDIIS, quibus hujusmodi AMOTIO VALEAT IMPEDIRI AUT DIFFERRI; quæ omnia IRRITA esse, volumus statuimus et decernimus.

De Modo procedendi contra Socios Scholares et Discipulos, in majoribus Criminibus.

—Et Præmissa, vel eorum aliquod in præsentī Statuto contentorum, coram Magistro assistentibus et Præsidente Decanis et Thesaurariis, vel saltem uno Decano Thesaurario et aliis quatuor ex Septem Senioribus, publicè confessus fuerit, vel per Testes idoneos prædictorum Judicio comprobandos, aut per Facti coram eis evidentiam, manifeste reus eorum Judicio et Sententia convictus fuerit; eum statim à dicto Collegio, præsentis Vigore Statuti, nullâ aliâ Monitione Præmissâ, exclusum et privatum fore ipso facto decernimus, absq; cujuscunq; Appellationis vel Querelæ Remedio.

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* P. 177.

De ambiguis et obscuris interpretandis.

Distribuisse igitur jam universis Collegij Membris Officia simul et Officiorum Leges nobis videmur, et exactè quidem: quæ si ferventur ad amussim et inviolatè, (quod utiq; vehementer optamus,) ex eodem viros haud dubiè speramus prodituros, qui' magnæ tùm Utilitati tùm Honori non solùm huic Collegio, verùm etiam toti Regno futuri sint. Provisum etiam est, quoad fieri potest per uniuscujusq; Juramentum, quo nihil apud Christianos firmitus aut antiquius haberi debet, ut Statuta hæc per Nos jam tradita et Auctoritate Sedis Apostolicæ corroborata, exactissimè ferventur à singulis, quatenus unumquemque concernant. Cæterum quia mihi Johanni Roffensi, per quem hæc edita sunt, tam à Summo Pontifice Julio secundo, quàm a Fundatrice cæterisq; omnibus Co-Executoribus, Auctoritas est tributa non solùm condendi Statuta quæ mihi viderentur huic Collegio conducibilia, verùm etiam Magistro simul et Sociis eadem exhibendi, Juramentaq; à singulis tam Sociis quam Discipulis pro illorum inviolabili Observatione districtius exigendi, sed et cætera cuncta peragendi quæcunq; pro salubri Collegij hujus Moderamine mihi visa fuerint opportuna, atq; id tam efficaciter quam si cuncti simul hic essemus Præsentes; Ego igitur, horum omnium pariter et meo ipsius nomine, cassatis aliis quibuscumque Statutis prius excogitatis, quatenus præsentibus adversantur, hæc præsentia ceu vera et Salubria pronuncio: Quibus observandis, tam Magistrum quàm Socios et Discipulos adstringi volo; reservatâ mihi nihilominus Potestate quoad vixero, vel adjiciendi vel minuendi seu reformandi interpretandi declarandi mutandi derogandi tollendi dispensandi novaq; rursus alia (si licebit) statuendi simul et edendi, non obstantibus his Statutis factis et Juramento firmatis; Cæteris autem omnibus, cujusvis Dignitatis Auctoritatis Statûs Gradûs aut Conditionis existant, ac Magistro quoq; et Scholaribus tam Sociis quam Discipulis omnibus hujus Collegij, prorsus inhibens ne cum aliquo dictorum Statutorum dispensent, aut quævis nova Statuta sive pro Collegio seu pro quovis ejusdem Membro, quæ dictorum Statutorum alicui repugnabunt, condant aut decernant. Quod si fortè Cancellarius aut Vice-Cancellarius aut Reverendus Pater ELIENSIS EPISCOPUS aut demùm quivis alius contrarium attemptaverit, et novum aliquod Statutum aliud à prædictis adhibere molitus fuerit, ab ejus Obligatione, per hanc Auctoritatem ab Executoribus aliis mihi commissam, Magistrum et cæteros omnes tam Socios quam Discipulos penitus absolvo, eisq; omnibus et singulis interdico ne cuivis hujusmodi Statuto aut Ordinationi pareant admittantve quovis Pacto, sub Pœna Perjurij atq; etiam Amotionis perpetuæ à dicto Collegio ipso Facto. Cæterum quia Nihil est usq; adèo luculentum quod non

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* non à Captiosis verti poterit in Quæstionem, ob eam Rem volumus* P. 178.
quòd si quicquam in aliquo Statutorum prædictorum aut Obscuritatis aut Ambiguitatis Magistro et Majori Parti Sociorum occurrat quoad nos vixerimus, eorum singulos in Christi Visceribus obtestamur ut ea dubia nobis proponant quoties oriantur, quemadmodum et hactenus fecerunt; nosq; libenter (ut et ante non semel fecimus) illorum dubiorum Obscuritatem excutiemus: Quòd si postquam Nos ab hac Luce migraverimus, novi quidem Scrupuli reperti fuerint aut de novo suscitati, volumus et Ordinamus ut rectus et laudabilis Statutorum Usus interea juxta Mentem nostram observatus, et qui maximè congruat Instituto Pientissimæ Fundatricis, sit Magistro pariter et Sociis Norma quædam et Regula quam cum Puritate Conscientiarum suarum sequantur in ejusmodi Scrupulis et Ambiguitatibus omnibus. Neque tamen per hoc intendimus, ut si præter Notitiam nostram quispiam abusus in Statutis ipsis, aut in quavis eorundem Parte, per Magistrum aut Officiarios aut quemlibet cæterorum in Cursu fuerit, quod is pro recto et laudabili Statutorum Usu recipiatur; aut si nos cum ipso Magistro qui nunc est, aut cum alio quovis Sociorum, in ulla Statutorum Parte dispensaverimus, Nolumus tamen ut hoc Privilegium, uni aut alteri ex causis nos moventibus concessum, pro communi quadam Licentia teneatur: Sed et cunctos oramus et per Christi Vulnera precamur, ut Juramentorum suorum meminerint, atq; nostram Mentem in ipsis Statutis respiciant, magis quàm aliquem qui præter Assensum nostrum clam irrepsit eorundem Statutorum Abusum; Nam omninò prohibemus, ne per aliquam Declarationem aut Consuetudinem ullam aut diuturnum quemlibet Abusum vel demùm Actum aliquem, Verbis aut Intentioni prædictorum Statutorum in aliquo derogetur. VISITATIONEM autem *hujus Collegij Reverendis in Christo Patribus* EPISCOPIS ELIENSIBUS COMMENDAMUS: Quibus et concessimus cujusdam idonei Præsentationem, qui sit futurus in hoc Collegio Socius. Idoneum autem intelligimus, qui Qualitates habeat eas quæ describuntur in Statuto de Qualitate Sociorum: Neq; enim alium quempiam recipi Volumus à Collegio. Eisdem etiam oramus et per Dominum Jesum obsecramus, ne quenquam præsentent nisi talem qui pro suis Meritis hoc Sodalitio dignus fuerit, et cui cum Statutis per omnia conveniat.

De Visitatore.

Nihil adeò bonis Legibus firmari muniriq; potest, quin ab his qui licenter vivere et Luxui Libidiniq; Fræna laxare student, aliquo Fraudis Commento facilè queat eludi. Nos igitur Fiducia Benignitatis Reverendissimorum Patrum *Episcoporum Eliensium* freti, et cum primis amantissimi Domini Dni Nicolai West qui Sedem Episcopalem jam suis Meritis obtinet, nempe quòd tam ipse quàm Successores

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* P. 179. * cessores ejus, pro Zelo quem ergà rem publicam Christianam gerunt, nullis futuris Temporibus PATIENTUR hæc Statuta contra nostram Mentem et contra sanctissimum Pientissimæ Fundatricis Institutum violari, statuimus ordinamus et volumus quòd *Episcopo cuiusvis Eliensi qui pro Tempore fuerit, QUOTIES per Magistrum et Præsidentem Decanosq; et Thesaurarios, sive per Magistrum et quatuor è septem Senioribus deputatis, sive per quinq; ex eisdem Senioribus reluctante Magistro aut Præsidente, seu per duas tertias Sociorum Partes, requisitus fuerit, sed et CITRA quamvis Requisitionem, DE TRIENNIO IN TRIENNIO semel ad Collegium accedere liceat, per Se, vel per Commissarium suum Specialem quem duxerit deputandum, præterquam per Cancellarium Universitatis Cantabrigiæ seu Vice-Cancellarium aut Procuratores Universitatis ejusdem, et præterquam per alios qui ex dicto Collegio pro aliquo Crimine aut Delicto amoti sint aut Amotionem hujusmodi fugientes recesserunt, ac præterquam per Magistrum aut aliquam aliam Personam dicti Collegij aut alios quoscunq; in Universitate per unam quindenam anno proximo eam Visitationem præcedenti Studentes, et præterquam per religiosos qualescunq; prædictorumve aliquem aut Consanguineum alicujus Socij dicti Collegij; liceat inquam, ad ejus VISITATIONEM liberè accedere, Magistrumq; ac alios singulos Socios Scholares ac Discipulos ejusdem Collegij in Sacellum ejusdem CONVOCARE: Cui quidem Reverendo Patri aut ejus Commissario, Vigore præsentis Statuti, PLE-NAM CONCEDIMUS POTESTATEM, ut super omnibus et singulis Particulis et Articulis in nostris Statutis contentis, ac de quibuscunq; Articulis Statum Commodum aut Honorem dicti Collegij concernentibus, aut quæ in dicto Collegio aut aliquâ illius persona fuerint reformanda aut corrigenda, præterquam de Secretis et Occultis, Magistrum Socios Scholares et Discipulos interroget et inquiret, COGATQUE eorum unumquemq; in Virtute Juramenti, ET PER Censuras si Opus fuerit, ad dicend. Veritatem de Præmissis omnibus et singulis, præterquam (ut prædictum est) de secretis et occultis; excessusq; ac negligentias crimina et delicta quorumcunque dicti Collegij, qualitercunq; commissâ, in eâ Visitatione comperta, secundum Excessus Exigentiam et Criminis aut Delicti Qualitatem debite PUNIAT et REFORMET; CÆTERAQUE OMNIA ET SINGULA FACIAT ET EXERCEAT, quæ ad eorum Correctionem et Reformationem sint necessaria aut quovismodo opportuna, etiam si ad PRIVATIONEM aut AMOTIONEM Magistri aut Præsidentis aut alterius cujuscunq; ab Administratione suâ vel Officio, seu si ad Amotionem alicujus Socij Scholaris vel Discipuli ab eo Collegio, si tamen hoc ipsum Statuta et Ordinationes exigant, procedere contingat. Quos quidem Magistrum Socios et Scholares Discipulos, ac præterea Ministros quoscunq; etiam Famulos, prædicto Domino Episcopo et ejus Commissario, quoad omnia et singula Præmissa, volumus et præcipimus effectualiter intendere et parere; Statuentes insuper, ut nullus in Visitationibus prædictis seu aliis Scrutiniis faciendis in dicto Collegio, contra Magistrum aut aliquem*

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* aliquem alium ipsius Collegij quicq^m dicat deponat seu denunci-
et, * P. 180.
nisi quod verum crediderit, seu de quo publica Vox et Fama labora-
verit contra eundem, in Virtute Juramenti ab eis Collegio præstiti;
Ordinantes præterea quòd Dominus *Episcopus Eliensis cum in Per-
sonâ propriâ visitare et præmissa facere dignetur*, Magister et The-
saurarij unicam ei intra Collegium Refectionem faciant; si verò per
Commissarium Episcopus visitaverit, Commissario duæ Refectiones
intra Collegium exhibeantur: Quibus tam Reverendum ipsum Pa-
trem q^m ejus Commissarium oramus ut contenti sint. Cæterum in-
ceptam aliquam Visitationem ultra duos Dies proximè sequentes, aut
ex Causis urgentissimis et rarissimis ultra quinque Dies, prorogari aut
continuari nullo Pacto volumus: Sed lapsò et exacto illo triduo, et
quando ex Causis prædictis ulterius prorogatur sexto die transacto, eo
ipso Visitatio illa pro terminatâ et dissolutâ habeatur. Et si quæ in
ea Parte compererit corrigenda et reformanda, quæ Brevitate Tem-
poris corrigere et reformare non potuerit, ea Magistro in Scriptis tra-
dat: Qui ea omnia, secundum Formam et Exigentiam Statutorum,
quam primùm corrigere et reformare, in Virtute Juramenti et sub
Pœna Privationis ab Officio suo ipso factò, teneatur. Prædictorum
quoq; Reverendorum Patrum Eliensium Episcoporum et Commissa-
riorum suorum quorumcunq; Conscientias, apud altissimum (quan-
tum possumus) gravius oneramus, ac in Visceribus Domini nostri
Jesu Christi hortamur et obsecramus, ut in faciendo et exequendo
Præmissa, secundum Apostoli Doctrinam “ non quærant quæ sua
“ sunt sed quæ Jesu Christi,” solumq; Deum habentes præ Oculis
Mentis, Favore Timore Odio Prece et Pretio Coloribus Occasionibus
post positis quibuscunq; Inquisitionis Correctionis et Reformationis
Officium diligenter impendant et fideliter in omnibus exequantur,
sicut coram Deo in ejus extremo Judicio in hoc Casu voluerint red-
dere Rationem; Statuentes præterea ut Magister Socius Scholaris
aut alius quispiam hujus Collegij, super Excessibus vel Delictis, in
*Visitationibus et Inquisitionibus per dictum Reverendum Patrem vel ejus
Commissarium ut præmittitur faciendis*, accusatus vel detectus, co-
piam compertorum vel detectorum hujusmodi sibi tradi dari
ostendi, ac Nomina detegentium vel denunciantium sibi exponi aut
declarari, nullo Modo petat; neq; ipsa comperta et detecta, aut No-
mina detegentium, tradantur eidem aut ostendantur; sed super eis-
dem compertis et detectis, *statim coram ipso Domino Episcopo vel
ejus Commissario personaliter respondeat, ac Correctionem debitam sub-
eat pro eisdem*, secundum nostrarum Ordinationum et Statutorum
Exigentiam et Tenorem, cessantibus quibuscunq; Provocationibus Ap-
pellationibus Querelis et aliis Juris et Facti Remediis, per quæ ipsius
Correctio et Punizio differri valeat seu alias quovismodo impediri.
Si tamen ad Privationem aut Inhabilitatem Magistri aut Expulsionem
Socij aut Scholaris per Episcopum aut ejus Commissarium agatur,
tunc ostendantur ei detecta: Quæ si non poterit rationabiliter et pro-
babiliter

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* P. 181. * babiliter evitare, et justâ Defensione propulsare, *amoveatur sine Appellatione aut ulteriori Remedio*; dummodò ad ejus Expulsionem concurrat consensus quatuor è septem deputatis Senioribus tunc in Universitate præsentibus; *sine quorum Consensu* irritata sit hujusmodi Expulsio, et nulla ipso facto. Et insuper, si contra Magistrum, ad Amotionem ab Officio, per hujusmodi Domini Episcopi Commissarium, etiam consentientibus ut præfertur quatuor illis Senioribus, procedatur, non negamus ei omnes Querelas et Defensiones justas et honestas *apud ipsum Dominum Episcopum Eliensem, dummodo ulterius non appellet*; non obstante nostrâ Ordinatione prædictâ, aut aliis quibusq;. PRÆTER HUNC *Visitationis Modum, nos ALIUM NUL- LUM Eliensibus Episcopis concedimus*; sed nec a Sociis tolerari permittimus, aliquo Pacto: Quod etiam eis mandamus, in Vim Juramenti sui. Scimus enim quòd eximia virago Domina Fundatrix, dum in humanis egit, *impetravit ab Eliensi Episcopo qui tunc fuerat, Jus Foundationis, eâ quidem Ratione ut ex desolatis Ædiculis tam illustre Collegium erigeret*: Quod cum effecerit et consummaverit magno suo Sumptu, *par est ut Elienses Episcopi NIHILO* * MAJOREM *in hoc Collegio sibi vindicent Autoritatem quàm in CÆTERIS Aca-*
demie Collegiis ubi non sunt Fundatores. His itaq; dictis Legibus, quas tùm salubres tùm justas existimamus, Magistrum et Scholares omnes tam Socios quam Discipulos Collegij divi Johannis in Cantabrigia, regi volumus et gubernari: Quibus si sese diligenter attemperent, nihil dubitamus quin afflatus aderit divini Spiritûs, qui rectâ perducet obsequentes ad magnam Eruditionem cum pari conjunctâ Sanctimoniâ. Neque enim fas est ambigere, quin facer ille Spiritus qui in quâvis Congregatione Christianorum residet, præsto sit adjuturus cunctos qui cum Fide et purâ Conscientiâ conversari conantur, justisq; et salubribus Monitis obtemperant; præcipuè tamen eos qui Studio sacrarum Literarum insudant. Nam ob has potissimum referandas ille missus fuit; “Quum,” inquit, “Venerit ille qui
 “ est Spiritus Veritatis, ducet vos in omnem Veritatem.” At quos ducet? Nimirum, *humiles et obsequentes.* Super hujusmodi requiescit, fovens eos, et indicibilibus eos Consolationibus reficiens: Sed et istis quum sit ostiarius, aperit ac referat Arcana Scripturarum. Nihil igitur vobis hæsitandum est, Fratres, quin si studueritis has Leges observare, pariter et unanimes in Charitate jugiter conversari, Patri nostro complacitum erit suo vos tandem afflare Spiritu: Quod ut faciat, ipse, tametsi Peccator sim, assiduè precabor; et vos vicissim, quæso, pro me precemini.

* V. post.
 195, 196,
 202.

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* De quatuor Sociis et duobus Discipulis per Johannem * P. 182.
Roffensem Episcopum fundatis.

Quinetiam decerno quòd ad Exercitamenta Scholastica, et ad ea quæ per Statuta Collegij cæteri Socii perimplere tenentur, similiter obstringantur; et ad ea perimplenda, pariter et ad has meas Ordinationes fideliter observandas, protinùs ut electi fuerint, Juramentum præstent corporale, et cætera faciant quæ ad hunc Effectum exiguntur; et si deliquerint, simili modo per omnia subjaceant Correctioni: Et idem etiam, quantum ad duos illos Discipulos attinet, fiat, juxta Modum et Formam quâ cæteri tractantur Discipuli. Postremò volo quòd ad has meas Ordinationes citra Fraudem observandas, tam Magister quam cæteri Socij, mox ut electi fuerint, Jurejurando sint obstricti; ne fortè per Negligentiam et Incuriam suam, ob Indenturarum inter nos confectarum Violationem, Collegio gravis inferatur Jactura.

E X T R A C T S from Queen *Elizabeth's* Statutes.

Preamble—

Elizabetha Dei Gratia.

Itaq; multis superioribus Statutis abrogatis, multis mutatis et emendatis, nonnullisq; novis additis, hæc, Autoritate nostrâ, inviolabiliter ab omnibus qui in hoc Collegio commorantur et commoraturi sunt, custodiri et observari volumus, quem ad modum uniuscujusq; Officium in Statutis sequentibus descriptum designatumq; fuerit; * reservat. semper nobis et Successoribus nostris &c.

* Note. This Clause of Reservation is not complete, in the Original; but it is more fully expressed in the 50th Chapter.

C H A P. 2d. De Electione Magistri.

Quod si tunc per * viam Spiritûs sancti concordibus animis, nemine * Vim. (forfi-
dissentiente, in unum quempiam ejusmodi Virum consenserint, tan :) v. ante,
qualis in Statuto antelecto descriptus est; Aut si major Pars Præsen- pa. 170.
tium super uno aliquo hujusmodi consenserint; Volumus et Statui-
mus absq; morâ (nullâ prorsus Licentia Ordinarij Visitatoris aut alte-
rius cujusq; Jurisdictionem ordinariam prætendentis expectatâ)
Magister Collegii pronuncietur: Quòd si quinq; illorum de uno
A a a aliquo

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* P. 183. * aliquo non consenserint, tum *ad* COLLEGII VISITATOREM *venia-*
tur ; et ille pro Magistro habeatur, *quem solus* VISITATOR *duxerit*
præficiendum, modò is Statuto de Qualitate et Officio Magistri in
omnibus respondeat.

CHAP. 11th. De Electione Præfidis.

Quòd si post tria aperta Scrutinia, ipse Magister cum quatuor de uno non convenerint, tùm is electus erit in quem ipse Magister cum tribus maximè Senioribus, ex dictis octo Senioribus Sociis Domi præsentibus aut majori eorundem Parte, consenserint. Quod si ne ii quidem ante horam tertiam ejusdem Diei de uno cooptando (ut dictum est) concordare possint, omnes tamen octo Seniores vel septem ex his de uno eligendo unanimiter consenserint, eo Casu volumus Magistrum illis Octo vel Septem sic consentientibus Assensum suum accommodare. Quod si ne Septem quidem sic ut prædictum est unanimiter consenserint, tùm is pro electo habeatur quem IPSE MAGISTER SOLUS nominaverit.

CHAP. 13th. De Sociorum Electione, ac ipsius Circumstantiis.

Porro, delectum hunc, quoties eveniet, celebrari volumus et ordinamus quâq; Die Lunæ quæ proximè sequitur Dominicam quintam Quadragesimæ: quo die Magister et octo Seniores convenient in Sacellum, cum Horologium insonuerit octavam; et illic, primùm lecto Statuto de Cooptandorum Qualitatibus, Magister primùm, deinde reliqui per Ordinem Seniores, Jusjurandum quod sequitur, tactis sacris Evangeliiis, præstabunt. “ Ego N. N. Deum testor, et
“ Sancta ipsius Evangelia, me Neminem in Socium hujus Collegij
“ electurum, nisi quem juxta Statutum antelectum mea Conscientia
“ magis idoneum judicabit; neq; illud faciam, Pretio vel Mercede
“ aliquâ à quopiam aut datâ aut expectatâ, neq; ullâ aliâ finistrâ aut
“ pravâ Affectione.” Juratis singulis, fiat statim apertum Scrutinium. Seniores vero, ut Simulatio promittendi et Spes decipiendi è medio tollatur, juxta Senioritatis Ordinem, publicè et ut cæteri exaudire possint, Suffragia conferant; Et de quo Magister et quatuor ex dictis Senioribus consenserint, is pro Socio habeatur: Quòd si post alterum aut tertium Scrutinium, de uno, quatuor cum Magistro non consenserint, tùm *eadem* Modo procedatur, quo in Electione Præfidis et Lectorum et aliorum Officiariorum dictum est; Et is Socius habeatur, qui *eo* modo electus fuerit.

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* C H A P. 14th. Jusjurandum electi Socii.

* P. 184.

“ Quòd si contingat me posthac propter Contemptum, Rebelli-
“ onem, Inobedientiam, malos Mores, vel alia Merita, vel propter
“ Causas in præsentibus Statutis contentas, per Magistrum vel alios
“ in hujusmodi Negotiis habentes interesse, corrigi aut puniri aut à
“ dicti Collegij Sustainatione et Societate secundum Formam Sta-
“ tutorum excludi expelli vel amoveri, ipsum Magistrum aut aliam
“ Personam ullam, Occasione Expulsionis aut Amotionis hujus-
“ modi nunquam persequar seu inquietabo, per me, alium, vel
“ alios; nec ab aliis molestari, vexari seu inquietari procurabo in foro
“ Ecclesiastico, seu Seculari, seu alio quocunq; Modo: Sed contra,
“ ex certa meâ Scientiâ purè, sponte, simpliciter et absolute, omni
“ Actioni, Occasione Correctionis, Punitionis, Exclusionis, seu
“ Amotionis hujusmodi, adversus Magistrum, seu alios dicti Colle-
“ gii Socios et Scholares, mihi quomodolibet conjunctim sive divi-
“ lim competenti, Appellationi quoque et Querelæ in eâ Parte fa-
“ ciendis, ac quarumcunq; Literarum Impetrationi, etiam Preci-
“ bus Principum Procerum, Magnatum, Prælatorum et aliorum
“ quorumcunq; (quantumcunq; mihi aliàs Probitatis et Vitæ Me-
“ rita suffragabuntur,) in Vim Pacti renuntio.”

C H A P. 50th. De ambiguis et obscuris interpretandis.

Distribuimus jam universis Collegii Membris Officia simul et
Officiorum Leges: quæ si servantur ad amissim et inviolata, (quod
utiq; vehementer optamus,) ex eodem viros haud dubio speramus
prodituros, qui magnæ tum Utilitati tum Honori, non solum huic
Collegio, verum etiam toti Regno futuri sunt: Provisum etiam est,
quoad fieri potest per uniuscujusq; Juramentum, (quo nihil apud
Christianos firmitus aut antiquius haberi debet,) ut Statuta hæc per
Nos jam tradita exactissimè servantur à singulis, quatenus unum-
quemq; concernant.

Abrogatis igitur quibuscumque aliis Statutis pro hujus Collegii Guber-
natione prius excogitatis, hæc Præsentia cum vera tum salubria pro-
nunciamus; quibus observandis, tam Magistrum quam Socios et
Discipulos astringi volumus; *reservatâ nobis* nihilominus Potestate,
vel adjiciendi vel minuendi, seu reformandi, interpretandi, decla-
randi, mutandi, derogandi, tollendi, dispensandi, novaq; rursus alia,
si Opus erit, Statuendi et edendi, non obstantibus his Statutis factis
et Juramento firmatis; *Cæteris autem omnibus*, cujuscunq; Dignita-
tis, Authoritatis, Statûs, Gradûs, aut Conditionis existant, ac Ma-
gistro

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* P. 185. * gistro quoq; ac Scholaribus tam Sociis quam Discipulis omnibus hujus Collegii *inhibentes*, ne cum aliquo dictorum Statutorum dispen-
sent, aut ulla nova Statuta five pro Collegio five pro quocunq; ejus-
dem Membro, quæ dictorum Statutorum alicui repugnabunt, con-
dant et decernant. Quòd si forte Cancellarius, aut Vice-Cancella-
rius, aut *Reverendus Pater Eliensis Episcopus*, aut demùm quivis
alius contrarium attentaverit, et novum aliquod Statutum [aliud] à
prædictis adhibere molitus fuerit ; ab ejus Obligatione, Autoritate
nostrâ, Magistrum et cæteros omnes tam Socios quam Discipulos
penitùs absolvimus, eisq; omnibus et singulis interdiciamus, ne ulli
hujusmodi Statuto aut Ordinationi pareant, admittantve quovis pacto,
sub Pœna Perjurii atq; etiam Amotionis perpetuæ à dicto Collegio
ipso Facto.

Quòd si inter Magistrum et Socios, aut inter Socios ipsos, aliosve
nostri Collegij, super aliquo Articulo Statutorum nostrorum, Dubi-
um aliquod, aut Ambiguitas, Controversia seu Opinionum Varietas,
vel Discordia oriatur, cujus Decisio seu sanus et planus intellectus,
intra octo Dies, à Tempore exorientis emergentis et commotæ Du-
bitationis computandos, nequiverit inter eos haberi ; tunc Volumus
ut Partes diffidentes duos ex Collegio Socios eligant, qui, ita electi,
quam citò poterit, REVERENDUM EPISCOPUM ELIENSEM *pro*
tempore existentem, (in quo sinceram fiduciam ponimus, quemq;
juxta planum, communem, literalem et grammaticalem Sensum et
ad Dubium prætensum aptiorem, omnes hujusmodi Ambiguitates
interpretaturum, dissoluturum, declaraturum, arbitramur,) ubicunq;
intra Regnum Angliæ fuerit, *adeant* ; vel saltem totam Controver-
siam, in duobus Scriptis, suâ ipsorum Manu aut Notarii Publici Sub-
scriptione, vel alicujus Sigilli authentici Appositione, munitis, *eidem*
Reverendo Patri significant.

Cujus quidem Reverendi Episcopi Determinationi, Interpretationi
et Declarationi, super prædicto Dubio ita ut præfertur disputato ac ad
eum delato, faciendis, Magistrum Præsidem Socios et cæteros omnes
dicti Collegii obtemperare Volumus, et cum effectu parere ; sub
ipsorum debito Juramento Collegio præstito, et Pœna Amotionis
perpetuæ à dicto Collegio, si contra fecerint, ipso Facto ; Nolentes
quod per Consuetudinem ullam, aut diuturnum quemlibet Abusum,
aut demùm Actum aliquem, Verbis aut Intentioni dictorum Statu-
torum in aliquo derogatur : Illud autem imprimis mandamus, ut
Juramentorum suorum meminerint, atq; nostram Mentem in ipsis
Statutis respiciant, magis quam aliquem (qui præter Assensum no-
strum clàm irrepsit,) eorundem Statutorum Abusum. VISITATI-
ONEM autem hujus Collegij Reverendis in Christo Patribus EPISCOPIS
ELIENSIBUS, COMMENDAMUS ; quibus et *concessimus cujusdam idonei*
Præsentationem, qui sit futurus in hoc Collegio Socius : idoneum au-
tem intelligimus, qui Qualitates habeat easdem quæ describuntur in
Statuto

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* Statuto de Qualitate Sociorum ; neq; enim alium quempiam RECIPI* P. 186.
Volumus à Collegio ; neminem autem illi præsentent, nisi talem qui pro suis Meritis hoc Sodalitio dignus fuerit, et cui cum statutis per omnia conveniat.

CHAP. 51st. De Visitatore.

Nihil adeo bonis Legibus firmari muniriq; potest, quin ab iis qui licenter vivere et Luxui et Libidini Fræna laxare student, aliquo Fraudis Commento facilè queat illudi. Nos igitur Fiducia Benignitatis Reverendi in Christo Patris *Episcopi Eliensis* qui nunc est, et *Sucessorum suorum*, freti, confisiq; quod Orthodoxæ Fidei et Reipublicæ Christianæ Zelo hæc nostra Statuta perpetuis futuris Temporibus inviolabiliter, ad Laudem Dei et Honorem Collegii, observari procurabunt et nitentur ; et ea vel eorum aliqua, contra nostram Mentem et sanctissimum piæ Fundatricis Institutum, minime violari patientur ;

Statuimus ordinamus et volumus, ut EPISCOPUS ELIENSIS *qui pro tempore fuerit*, QUOTIES per Magistrum et quinque ex Senioribus, sive per septem Seniores, reluctante Magistro, REQUISITUS fuerit, ad Collegium valeat et possit accedere ; Magistrum, Præsidem, Decanos, Thesaurarios, Socios, Scholares et Discipulos Collegii, in Ecclesiam ejusdem convocare ; Collegium tam in Capite, quàm in Membris VISITARE ; ac de et super omnibus et singulis, Statum Commodum et Honorem dicti Collegii, Statuta, Magistri, Præsidis, Decanorum, Thesaurariorum, Sociorum, Discipulorum vel Ministrorum Reformationem et Correctionem, concernentibus, diligenter inquirere ; Juramentum, “ de dicendo Veritatem in Præmissis “ omnibus et singulis,” ab iisdem exigere ; Crimina, Excessus, Delicta et Negligentias quorumcunq; dicti Collegij, qualitercunq; Commissa in eâ Visitatione comperta, secundum Criminum, Excessuum, Delictorum et Negligentiarum Qualitatem et Exigentiam, debite punire corrigere vel reformare, ac JURISDICTIONEM SUAM ORDINARIAM, quam volumus et hoc Statuto nostro ordinamus ad eundem Episcopum Eliensem et Successores suos in perpetuum spectare et pertinere, in Magistrum et Socios dicti Collegij exercere, CÆTERAQUE OMNIA ET SINGULA facere et exercere quæ ad eorum Correctionem et Reformationem sunt necessaria aut quovis modo opportuna ; etiam si ipsum ad Privationem seu Amotionem Magistri Præsidis aut alterius cujuscunq; ab Administratione vel Officio, seu ad Amotionem alicujus Socii Scholaris vel Discipuli ab eo Collegio, (Si tamen hoc ipsum Statutum et Ordinationes exigant,) procedere contingat. Eum autem volumus, Visitatione semel inceptâ atq; inchoatâ, ut quam citò commodè poterit, causas omnes dijudicet et determinet, ac Fi-

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* P. 187. *nem Visitationis suæ omninò *intra quindecim* post ejus ad Collegium Accessionem Dies faciat.

Statuimus insuper, ut *in Visitationibus Collegij per Reverendum Patrem Eliensem Episcopum* quemcunq; pro tempore existentem, nullus Sociorum aut Scholarium contra Magistrum aut aliquem alium illius Collegii quicquam dicat, deponat, detegat, vel denunciât, nisi quod verum credat, seu de quo publica Vox et Fama contra eundem laborat, sub Pœna Violationis Juramenti ab iisdem Sociis et Scholaribus Collegii præstiti : Et super Excessibus vel Delictis in Visitatione et Inquisitione hujusmodi, Detecti, denunciati vel accusati, (Copiis detectorum et compertorum, nominibusq; detegentium iis minimè traditis vel ostensis,) super Excessibus et Delictis hujusmodi constituti coram Domino Eliensi Episcopo, summarie et de plano procedente respondeant et eorum quilibet respondeat per se, Correctionem debitam pro iisdem subeant et eorum quilibet subeat, secundum nostrarum Ordinationum et Statutorum Exigentiam et Tenorem; cessantibus quibuscunq; Provocationibus, Appellationibus, Querelis, et aliis Juris et Facti Remediis, per quæ ipsorum et cujuslibet eorundem Correctio et Punitio differri valeat, seu aliàs quomodolibet impediri—Si tamen ad Privationem Magistri, aut Expulsionem Socij Scholaris vel Discipuli agatur, tunc volumus et statuimus ut ostendantur ei Detecta : Quæ si rationabiliter et probabiliter evitare et justâ Defensione propulsare non potest, volumus ut amoveatur, sine Appellatione aut ulteriori Remedio.

Et si quæ alia in Membris corrigenda et reformanda fuerint, quæ Brevitate Temporis corrigi et reformari non poterunt, ea omnia et singula Magistro in Scriptis tradet : qui, secundum Formam et Exigentiam Statutorum, et in virtute sanctæ Obedientiæ ac Juramenti sui, sub Violationis Pœnâ, hujusmodi corrigenda et reformanda diligenter et fideliter corrigere et reformare studebit, et tenebitur. Dissolutâq; Visitatione, pro Esculentis, Poculentis, Expensis, Oneribus, et Procuracionibus ratione Visitationis hujusmodi debitis, volumus et statuimus ut Summa pecuniaria, in bonæ Memorix Domini Jacobi olim Eliensis Episcopi Concessionibus et Ordinationibus limitata et declarata, absq; dilatione quâlibet solvatur. Reverendi vero Patris Episcopi Eliensis cujuscunq; pro Tempore existentis Conscientiam apud altissimum oneramus, et in Visceribus Domini nostri Jesu Christi hortamur, ut in faciendo et exequendo Præmissa, secundum Apostoli Doctrinam “ non quærat quæ sua sunt, sed quæ Jesu Christi”; solumq; Deum habens præ Oculis Mentis, Favore, Timore, Odio, Prece, aut Pretio, Coloribus aut Occasionibus post habitis quibuscunq; Visitationis, Inquisitionis, Correctionis, Reformationis Officium diligenter impendeat, et fideliter in omnibus exequatur, sicut coram Deo, in ejus extremo Judicio, in hoc Casu voluerit reddere Rationem.

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* His igitur dictis Legibus, &c, (sicut in Conclusionem Capitis de * P. 188.
Visitatore, in Episcopi Fisherii Statutis.) *

* V. pa. 181.

CHAP. 25th. De Modestia, et Morum urbanitate.

Omnes Lites domesticæ INTRA Collegium et cognoscantur et judicentur. Qui *foràs* aliquem in Jus vocaverit, sine Consensu Magistri, aut (eo absente) Præsidis et majoris Partis Seniorum, Collegio amoveatur. Dissensiones inter Socios Discipulosve ortæ intra biduum, si fieri possit, à Magistro, aut (eo absente) Præside et octo Senioribus, sedentur: Sin fieri non possit, quatuor Socij per dissentientes eligendi, cum Magistro, aut (eo absente) Præside, Litem audiant, et cum Æquitate dirimant; et quam illi omnes, vel Magister (aut si ille absit,) Præsides, cum duobus sic electis, Sententiam tulerint, in eâ conquiescant dissentientes: qui secùs fecerit, Collegio privetur. Lis verò inter Magistrum et Socium unum aut plures orta, à Præside et reliquis Senioribus, aut (si Præsides unus litigantium sit) à Socio maximè Seniore, qui unus litigantium non sit, et cognoscatur et (si fieri possit) tranquilletur: Sin intra biduum hoc fieri non possit, ad *Præpositum Collegij Regalis, Magistros Collegiorum Trinitatis et Christi*, per duos Socios utrinq; eligendos, Lis deferatur; et quod duo ex illis statuerint, juxta Formam Statutorum aut Leges Regni nostri, id ratum esto. Qui non paruerit, Collegio amoveatur.

Also

In the Chapter relating to the Election of the Master,

It is ordained, That if Five of the Fellows, after two Scrutinies (to be ended upon the same Day) should not agree upon One Person, Then they are to come to the *Visitor of the College*; And He is to be esteemed as Master, Whom the VISITOR *only shall* THINK FIT to set over them: Provided He answers to the Statute, in all Points, concerning the Quality and Office of Master; And the said Visitor shall signify to the Fellows of the same College, within 20 Days from the Day of such Devolution upon Him, by an Instrument sealed with the Seal of his Pastoral Office, the same Person so promoted to the Mastership.

In the Chapter relating to the Election of President, Lecturers, and other Officers,

It is ordained, That if the Master and Fellows should not agree in the Election; And the Master should be out of the Kingdom; Then *He whom the Bishop of Ely, Visitor of the said College*, being

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* P. 189. * ing within the Kingdom, *shall nominate*, is to be elected into the Office.

N. B. By the *annexed* Foundation, (i. e. the before mentioned Foundation of the two *Southwell-Fellowships*;) *Some* Objects of Election were made preferable to *others*: And *Todington's* Right, upon the Merits, depended upon his being a PREFERABLE Object; whereas *Craven* was only a *general One*. But the Exception taken to *Todington*, against electing *Him* into the Fellowship, though otherwise a preferable Object within Dr. *Keton's* Descriptions, was his being MUTILATED, and *thereby* excluded, by the Foundation, from being *capable* to be chosen: For that by One of the old Statutes, (prior to Dr. *Keton's* Deed, which refers to them,) it is Ordained “ That “ the Persons eligible as *Scholars*, should be *Corpore nullis contagiosis aut incurabilibus Morbis vitioso, aliasve deformi “ aut MUTILO.*” From whence it was inferred that though this Clause is not indeed repeated as One of the Qualifications of a *Fellow*, yet it must be so *intended*: For the Statutes could never mean to require less Perfection in the Fellows than in the Scholars; since the Fellows are expressly described as *Potiora et solidiora Membra Collegij*, and are to be elected *out of the Scholars*; and are considered as designed for the Ministry and Holy Orders, into which no deformed or mutilated Persons are admissible.

The Counsel who shewed Cause against the Prohibition, and who argued (at first) only from Queen *Elizabeth's* Statutes, (for Bishop *Fisher's* were not laid before the Court, till some time afterwards,) made three Points upon them; *viz.*

1st. Whether the Bishop's General Visitatorial Authority does not extend to the Election of Fellows, upon the *Original* Foundation.

2d. Whether it extends to this *annexed* Foundation.

3. Whether the Clause which gives *Distress* upon the Estates of the College, *excludes* the Visitor.

And several of Queen *Elizabeth's* Statutes were read, on Behalf of the Visitor; particularly, the 50th (de ambiguis et obscuris interpretandis,) and C. 51st. (de Visitatore,) and also C. 2. (de Electione Magistr.)

Contra, on Behalf of the College, were read and relied on, C. 25th. (de Modestia &c. C. 13th. (de Electione Sociorum) and C. 11th. (de Electione Præsidis).

N. B.

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* N. B. All these were Queen Elizabeth's Statutes : And it was * P. 190.
said by the Counsel for the Visitor, that though *Bishop Fisher*
As *surviving Executor* of *Margaret Countess of Richmond*,
gave Statutes ; Yet he had no Power, As *Executor*, to do so ;
and that therefore *Queen Elizabeth* afterwards gave *fresh* Sta-
tutes.

Cur'. Let it stand over till to Morrow : And Let Us have Copies
of the material Statutes, in the mean time.

On *Friday* the 26th of *November* 1756, This Motion proceeded.
And on Behalf of the Visitatorial Power, it was argued, 1st. That
the Bishop had a GENERAL *Right of Visitation of the College* ; which
included the ELECTION OF FELLOWS, as well as other Matters that
concerned the College ; 2dly. That this General Right extends to
the ANNEXED, as well as to the *Original* Foundation ; and 3dly.
That the *Clause of DISTRESS*, (which had been urged to be a *dis-*
tinguished and particular Remedy given by the annexed Foundation,) did
NOT exclude the general Right of the Bishop to visit.

First—The original Foundation of the College was upon *express*
Condition “ That the Bishop of *Ely* should be Visitor.” And Dr.
Keton's Foundation is incorporated with the Original Foundation :
He was, in Effect, only a *Purchaser* of two Fellowships and two
Scholarships.

And the new Statutes (of *Queen Elizabeth*) were *subsequent* to
Dr. *Keton's* Foundation : And Dr. *K.'s* Fellows were *Part* of the
College, at the Time when these Statutes commend the Visitation
of the College, i. e. of the *whole* College, to the *Bishops of Ely* for
the Time being. These Statutes constantly speak of the Bishops of
Ely As *General* Visitors of the College at *that* Time, and *already*
so ; and *not* as being constituted so, merely and only BY *those* Sta-
tutes of *Queen Elizabeth*. And his *General* Visitatorial Power in-
cludes the Election of Fellows, as well as other Matters.

The *General* Visitor, upon *Lay* Foundations, is the *Founder* :
Upon *Spiritual* Foundations, the *Ordinary*.

The *general* Power of Visitation of the College is given to the
Bishop of *Ely*, *eo nomine* of “ *Visitor*.”

No particular set Form of Words is necessary to the Appoint-
ment of a Visitor. *Fitz-Gib.* 305. *Dr. Bentley v. Bishop of Ely*—
“ *Visitor fit Episcopus Eliensis*,” was the Bishop's *whole* Right to
be general Visitor of *Trinity* College.

C c c

And

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* P. 191. * And He is complete Visitor : And such Power may cease and revive again. The Case of *The King v. Bishop of Chester*, Warden of *Manchester College*, 2 *Strange* 797. proves this.

The late Case of *Dr. Green v. Dr. Rutherford* in Chancery, was only a Trust, given upon another Footing.

No Objection can arise, as to executive Part, from the legislative Power being reserved to the Crown.

Deprivation and Admission of Fellows are incidental and essential to the General Power of a Visitor. Sir T. Jones 175. *The King v. Warden of all Souls College*, in *Oxford*.

Neither is it any Objection, "that particular Times and Occasions" of going to the College, are stated and specified : For upon particular Gravamens, He may exercise the Power of Admission and Deprivation, *eo nomine as Visitor*.

Second Point—The Bishop's General Visitatorial Authority extends to the ANNEXED Foundation, *as well as* to the original Foundation. Both are within the same Reason : And these ingrafted Fellows are to be bound by, and even to swear to the Statutes then in being. And here, No new Statutes are given by the annexed Founder : And the Power he reserved was only to give additional Ones *conformable* to the old Ones. And the Indenture refers, throughout, to the Original Foundation : Which is a strong Implication. In 5 *Mod.* 421. indeed this Point, "Whether the Visitor appointed by the Founder, can be extended to the new Fellows" was doubted. This is called Mr. *Jenning's Case*, of *Clare-Hall* : It was then adjourned, and does not appear ever to have been determined. But on 21st March 1747, in the Case of the *Attorney General, at the Relation of Mapletoft, v. Talbot*, (the Case of the Master and Fellows of *Clare-Hall* in *Cambridge*.) Lord *Hardwicke* held "That the annexed Foundation, where no new Statutes are given, must follow the Original Foundation."

Third Point.—This Deed giving another Remedy, *viz.* by DISTRESS, does NOT preclude the Visitor. It is not *ad idem* : It is given to the Church of *Southwell* ; NOT to the Party injured in Point of Election and Admission. But however, if it HAD been given to the Party injured, it could not have taken away his Appeal to the Visitor, for Relief : For the One is in Order to obtain Election and Admission ; the Other, for the Profits. The SPECIFIC Relief must come from the Visitor : The Distress would be only for the Delay.

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* 2 *Strange* 1061, *Middleton et Ux. v. Croft in B. R.* (the third and * P. 192. last Question) It was resolved "That the Statute of 7 & 8 W. 3. " *did not*, by inflicting a Penalty, take away the Jurisdiction of the " Spiritual Court." The Distress may be intended, to *prevent Collusion* between the College and the Visitor; And as a Method to bring the Matter *collaterally* in Question: For notwithstanding what may be said in the Books, particularly in the Case of *Philips v. Bury* (*Exeter College Case*,) it would be very difficult to maintain a *direct* Action for such Collusion.

These new Fellowships were, by the Deed, to have *All* the Rights of other Fellows. Now *one* of these was a Right of Appeal. And shall the *Nomine Pænæ* and Clause of Distress given to the CHURCH of *Southwell*, take away the DISTINCT *Rights* of the CANDIDATE, and of the BISHOP? No: *They* have a Right to the *Remedy*; but *none* to the *Penalty*; The Penalty belongs *to the* CHURCH of *Southwell*. But *if* the Penalty had been given *to the* CANDIDATE; Would that have DISCHARGED the College's Obligation to perform their Contract? And the Restriction from going "*foras*," does not exclude the *Visitor*, (for He is *domestic*;) but it only excludes *forensic* Jurisdictions, *Courts of LAW*.

And the *collateral Penalty* cannot hurt the SPECIFIC *Remedy*: For it is *not adequate* to the Injury; Nay, It is *not* even given to the PERSON *injured*; and it is *temporary*. However, the *same* Person may have SEVERAL *Remedies*. And this is not the first Instance of the present Question, in this very College; For Mr. *Pegg's* Case in 1726 was in Point; and there the College submitted. The Case was exactly the same with the present, excepting only that it was upon Dr. *Beresford's* Foundation; which also was by *Deed*, and with a *Clause of Distress*, as this is. His Foundation was likewise of two Fellowships and two Scholarships in this College, by Indenture tripartite, made 12 February 11 H. 8. between the College, the Dean and Chapter of *Litchfield*, and Himself; in Consideration of 400 *l.* given by Him to the College: In which Indenture a Forfeiture is fixed; And a Right of Entry into the College-Lands, given to the Dean and Chapter of *Litchfield*, to distrain for it. Mr. *Pegg* was elected. Mr. *Burton* appealed to the Bishop of *Ely*, as Visitor. Mr. *Pegg* protested against his Jurisdiction. Civilians and Common Lawyers were heard, upon the Point of the Jurisdiction. The Visitor pronounced for his own Jurisdiction; and afterwards gave Sentence for Mr. *Burton*, the Appellant; and issued his Monition to the Master President and Six Senior Fellows, "to admit Mr. *Burton*." This Monition was *obeyed*; and Mr. *Burton* admitted into the Fellowship, by the President: By whom a Certificate thereof was duly returned to the Visitor.

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* P. 193.
V. Skinner
483, 484.

* The Right of Visitation arises from the Common Law; as *Ld. Ch. J. Holt* held in the Case of *Philips v. Bury*: * (though *Bishop Stillingfleet* said it arose from the Canon Law.) There was a Case of this very College, which is reported in 4 *Mod.* 233. *Rex & Regina v. St. John's College, Cambridge*; and *Comb.* 279. S. C. and *Skinner* 359, 368, 393, 546. S. C. Where the Court thought they ought to see that the Law be executed. And another Case also, relating to this same College, was *Dr. Rutherford's Case*; which was upon a special Trust. But the Courts of Justice will not interfere, unless the Visitor abuses his Power, in exerting it where He ought not.

Then the Counsel for the Bishop and Mr. *Todington* offered AFFIDAVITS, as to Matters of Fact.

But Lord *Mansfield* said, This Court cannot enter into the MERITS of the ELECTION: For the Question before Us is “Whether the Bishop of *Ely* appears to have a Right to judge “in this Case, as Visitor.” If He has, there is No Ground to prohibit: If He has no such Jurisdiction, He ought to be prohibited.

The Counsel who argued for the Prohibition, begun with laying down some *General Positions*—As, that *Fundatorial Right* takes its Rise from the Property of the Donor; That a *Founder* may give Statutes; That if He does not, the Right of visiting remains in the Founder or his Heirs; That He may appoint a Visitor, either general, or partial, (with Regard to his Powers,) as He himself pleases; That if He gives him only partial Powers, the Visitor cannot exceed them; That if the Visitor should attempt it, the Court will by Prohibition restrain the Excess of Jurisdiction; That the Court will never refuse Liberty to declare in Prohibition, wherever there is the least Doubt, (in order that the Matter may be solemnly determined upon Record, and so be subject to a regular Course of Appeal;) That a Visitation Power is not to be inferred by Implication, but must be given by express and direct Words; (as was determined by Lord Chancellor *King*, assisted by two great Judges of the Common Law, in the Case of *Eden v. Foster*,) reported in 2 *Peere Wms.* 325. the Case of *Birmingham School*.)

Then they entered upon their Argument, to the following Effect. 1st. The Bishop of *Ely* is not GENERAL Visitor of this College; but only Visitor in particular Instances: And the General Right of Visitation in all other Instances, remains in the Crown. This, they said, will appear from the 50th, 51st and 25th Chapters of Queen *Elizabeth's* Statutes.

C. 50th.

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* C. 50th. "*Reservatâ Nobis Potestate vel adjiciendi vel minuendi, * P. 194.* feu reformandi interpretandi &c. "*Cæteris autem OMNIBUS &c,* inhibentes &c. And immediately after, the Bishop of *Ely* is PARTICULARLY *there named*, as One of the Persons *prohibited* from counteracting the Statutes. And it concludes with giving the Bishop of *Ely* a *Compensation*, viz. the Nomination of a Fellow; who must be *idoneus*: And the *College* are appointed to *judge* of the Idoneity; For it is said, "*Neque enim alium quempiam recipi volumus à Collegio.*" Indeed the Bishop is immediately afterwards admonished to offer no Other than a proper Person: But still the *College* are to be the Judges, even of the *Bishop's* own Nominee.

C. 51st. (de Visitatore) gives him Power *accedere*, only *quoties* he shall be requested &c. and He is thereby restrained to close his Visitation within 15 Days: And there are many *particular* Powers minutely given him; *Which exclude* the Supposition "That He has "the General Power."

C. 25th. (de Modestia) directs that omnes Lites domesticæ *intra Collegium et cognoscantur et dijudicentur*; and orders Expulsion to Him qui *foras* vocaverit &c; and refers their Domestic Disputes to be settled either amongst themselves, in College; or by the resident *Masters of other Colleges* particularly therein named.

They denied that in Dr. Bentley's Case, the Expression "*Sit Visitator,*" was the Ground of the Resolution: (Which Words, however, are *not*, as they observed, in the present Case.) But in that Case the *Intent* of the Crown fully appeared, *throughout*, "to "give the *whole* Power to the Bishop of *Ely*. Whereas here, the Crown *reserves* Powers to itself, of various Kinds; and might have appointed *new* Visitors: But there, on the contrary, the Right was *perpetually* given to the Bishops of *Ely*. Here, the Bishop's Visitatorial Power is *limited* and *circumscribed*: Whereas a *General* Visitor might do *all that a Founder* could do. Here, He cannot visit *ex Officio*, in less than 5 Years.

As to *Strange 797*. The Bishop of *Chester's* Case, as Warden of *Manchester* College—They agreed that in certain Cases, the Visitatorial Right may be suspended, and revive again. But that Case, they said, was not at all like the present Case.

As to the Case of *Dr. Green v. Dr. Rutherford*—It was only a Construction of a Will, containing a *Trust*; which was not an Object of the Visitatorial Jurisdiction. Besides, the Point of Judgment in that Case, they said, was with them.

D d d

And

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* P. 195. * And they concluded that therefore No Appeal lies to the Bishop of *Ely* in the *present* Case, upon the Foot of its being, *in general*, ONE of the Fellowships of this College.

2dly. Much less does it lie in this Case of an ANNEXED Fellowship given by a *subsequent* Foundation. The Law will NOT *imply* that Dr. *Keton's* Foundation is subject to any *other* Visitor than Himself and his Heirs. An *ingrafted* Foundation does not fall under the former Powers, IF the annexed Founder gives *other* Laws.

Now this is not a Co-Foundation, but a *New* Foundation.

* Ante, pa.
181. Polt.
196.

It is not true, "That Dr. *Keton* knew the Bishop of *Ely* to be "General Visitor." On the contrary, the Bishop was NOT *so*, by Bishop *Fisher's* Statutes: For by those Statutes, the Bishop had no Right to interfere in the * *Election of Fellows*. And Dr. *Keton* reserved a Power to give Statutes consistent with the Statutes of the College: And this Right is either *still subsisting* in Dr. *Keton's* Heir; or *devolved* to the Crown. Now at *that Time* of Dr. *Keton's* Foundation, the Bishop of *Ely* had no Right of Visitation *as to* the *Election of Fellows*.

3dly. Here is a COMMON-LAW Redress given: Which No Visitor can have a Right to *discuss*. And the *specific Remedy* is not to come from the Bishop of *Ely* at least; Whatever it may be, or from whomsoever it is to come. They may go to a proper Jurisdiction, for it. And as to the Case of *Burton v. Pegg*, perhaps the Bishop of *Ely* was appointed Visitor by Dr. *Berisford*: Or the Party concerned might not think proper to oppose, or not be able to oppose the Bishop's Proceeding. However the Submission of the College cannot take away the Right of the Founder, nor the Right of *this Court*; nor give to the Bishop a Right which He has not in Him.

As to 4 Mod. 233. *Rex et Regina v. The Master and Fellows of St. John's College*, and *Skinner* 359. &c. S. C. (Dr. Gower's Case,) and *Comberb.* 279. S. C. The Return was not the Dictum of the College: And such General Terms were out of the Case and improper. And the Case of *Middleton & Ux' v. Croft* is not applicable. *The Register of Writs*, Title *Prohibitiones*, pa. 38. is similar to this Case, as to the being a Common-Law Contract: "Cum placita de "annualibus redditibus &c, &c, &c, ad nos et Coronam et Dignitatem nostram specialiter pertineant &c."

The Visitor is *bound by the Deed*; And He cannot have any Pre-
tence to proceed in this Case, *until* the Covenants are broken, and
the College have incurred the Penalty: And of THIS, the Courts
of

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*of Common Law are to judge. If *both* Jurisdictions should proceed * P. 196. together, their Determinations may directly clash—Therefore the Common-Law Courts will prohibit Him from proceeding at all.

Dr. Keton was a PURCHASER of these two Fellowships: And He reserved a *Power of Distress*. The Requisites to his Fellowships are, being a *Chorister of Southwell*, if, &c; and having *Learning*, and *Morals*. If the College should fail to choose *such* Persons, &c, they are subjected to a *Forfeiture*; for which, a *Distress* may be taken: This is the Sanction annexed; And this is an *adequate Remedy*. And upon this Deed, the Chapter of *Southwell* are only *Trustees* for the Candidate; And they would be answerable to Him. And this would subject the Matter to the Court of Chancery, as a Trust; and might also subject it to this Court, as to granting a *Mandamus* to admit him. And therefore, *though* the Bishop should even be considered as *general Visitor* of the College, Yet this Court would prohibit Him, from proceeding in this particular Affair; or at least, give the College Leave to *declare* in Prohibition. This Court will prohibit Jurisdictions who are proceeding without Right; *although* they themselves cannot, perhaps, give an *adequate* Remedy. However, here, the Founder considers the Distress As an adequate Remedy.

They concluded with saying that they only desired Leave to *declare* in Prohibition; not an *absolute* Prohibition.

Mr. Just. Foster said He had not seen Bishop *Fisher's* Statutes; which *though now* repealed, were yet in Force *at the Time* of this annexed Foundation: And they are said * to *restrain* the Bishop * V. Ante. from exercising any Powers relating to the *Election of Fellows*. 181 & 195. Now THAT may deserve Consideration, *though* these Statutes should be *now* expired: For they were understood to be IN FORCE at *that* Time when Dr. Keton made his Foundation.

On the Day following (*viz. Saturday 27th November 1756*.) Ld. Mansfield said that upon looking into the Papers left with Him, He found it necessary, towards coming to a complete Understanding either of the Statutes or of the Deed, “ That the PRIOR Constitution “ of the College, antecedent to *Both*, should be laid before the “ Court; ” As both the Deed and also Queen *Elizabeth's* Statutes expressly REFER to this *prior Constitution* of the College, and consequently must be (in some measure) unintelligible and inexplicable, unless it be also known, “ WHAT that prior Constitution *was*. ” He proposed therefore that the Parties should, in the best manner they could, lay this Constitution before the Court; and that the Case should, be spoken to again in the next Term; not by all the Counsel arguing it over again, but by only *One* Counsel on each Side, who should apply themselves to *such Conclusions* as might arise from such prior Constitution of the College, and be applicable to Queen *Elizabeth's* Statutes or to the Deed of Covenants.

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* P. 197. * The Case was accordingly Adjourned till next Term, to be then spoken to by One Counsel on each Side, on the *prior* Constitution of the College, antecedent to Dr. Keton's annexed Foundation and Deed, and consequently to Queen Elizabeth's Statutes likewise.

On this Day (i. e. *Thursday*, 3d *February* 1757,) this Case was again spoken to, by One Counsel on each Side.

Mr. *Yorke*, Solicitor General, on the Part of the Bishop and Mr. *Todington*, made 3 Questions, *viz.*

1st. Whether the Bishop is not *as extensive a Visitor*, under the *Old* Constitution, as under the *New*.

2dly. Whether the *College* are not *bound* by the *Acceptance* of the *new* Statutes.

3dly. Whether Dr. *Keton's Fellowships* are not *bound* by the *Acceptance* of the *new* Statutes, *as well as the Rest* of the College.

First—He insisted that the Bishop is as extensive and complete a Visitor under the *Old* Statutes, as under the *New*. This he endeavoured to make out, from the *Old* Statutes of the College. [And upon these, the Question must depend.]

Secondly—The *College* are *bound* by the *Acceptance* of the *New* Statutes.

Ld. *Mansfield*—The *College* *will not* (most undoubtedly,) agitate *that* Question: For if they do, they must give up All their Livings, &c, and all other Advantages that they claim UNDER them.

Mr. *Norton*, on the Part of the College, readily agreed to this; saying that they *should not* (certainly) make a Question of this; having *acted* 200 Years UNDER *these new* Statutes.

Mr. Solicitor General then proceeded to his 3d Question—

Thirdly—He insisted that Dr. *Keton's Fellowships* are *bound* by the *New* Statutes, *as well as the Rest* of the College: For, as He has *not given new* Statutes, these Fellowships are to be conducted and bound by the *ordinary* Statutes of the College; And the rather, for that *these* Fellows enjoy All Privileges, and come into the Seniority, in the *same Manner as the Rest* of the Fellows do.

Mr.

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Mr. Norton, *contra*,—for the College.

* P. 198.

This Case stood over, in Order to see what was the State of the College, *at the Time* when Dr. Keton's Deed of Covenant was made; *At which Time, Bishop Fisher's Statutes subsisted.*

The Bishops of *Ely* were Owners, originally, of the *Site* of the College; And, *As Bishops of Ely*, were *ordinary* Visitors of this Place: From One or both of which Circumstances, they might possibly set up a Right of Visitation. Now Bishop *Fisher's* Statutes professedly mean to obviate any such Pretension; and to prevent the Bishops of *Ely* from claiming a Right of Visitation, *as General* Visitors of the College. Which Position Mr. Norton endeavoured to prove from Bishop *Fisher's* Statutes. And He said that if the Statutes were to be construed otherwise, it would occasion a Clashing of Jurisdictions and the utmost Confusion in the College. As to any Power or Visitation that the Bishops of *Ely* may have *at common Law*, He said He did not mean to dispute *that*, with them: But as to the Claim of a GENERAL Visitation Power over the College, He prayed Leave to *declare* in Prohibition; that it might be solemnly determined upon Record, and that each Side might have an Opportunity of appealing elsewhere, if dissatisfied with the Determination of the Court.

He strongly contended, That it was *premature*, to determine *now*, “Whether the Bishop of *Ely* had Jurisdiction;” That there ought to be a Rule for the Plaintiffs to *declare*; That such was the Course of the Court, and it had not been usual to examine the Matter upon *shewing Cause*: *After a Declaration* in Prohibition, the whole would appear upon Record, be solemnly judged, and the Judgment might be reviewed upon a Writ of Error.

Lord Mansfield—*If* the Party who applies for a Prohibition has a Right to declare, though the Court should see *no Ground* for the Motion; A Rule “to shew Cause why the Prohibition should not be granted.” is to no Purpose; and Hearing Counsel upon the Sufficiency of that Cause is Time mispent.

When the Matter seems *doubtful* to the Court, upon a Question of Fact or Law, the Plaintiff has Leave to declare; that the Parties may have the Fact properly tried by a Jury, or the Law solemnly considered, as in a Cause.

When the Court is clearly of Opinion that there is sufficient Ground for the Prohibition, the Defendant has a Right to put the Plaintiff to declare; that his Jurisdiction may not be taken from him, in a summary Way, where no Writ of Error will lie. But

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* P. 199. * if the Court be *clearly* of Opinion That there is NO *Ground* for a Prohibition, It ought to be denied, *without* putting the Defendant to Expence, and delaying, in the mean Time, the Exercise of what appears to them a *lawful* Jurisdiction.

This Denial is *not conclusive* to the Plaintiff. *If* there is no Jurisdiction, the Sentence will be a *Nullity*; and upon any Attempt to execute or inforce it, the whole may be tried in an Action. The Plaintiff may also apply to any *other* Court in *Westminster-Hall*, for a Prohibition; and take *their* Opinion.

If, in Cases of this kind, the Court should too easily yield to hang up the Matter, by letting the Plaintiff declare in Prohibition; Redress would come too late, and cost too much.

I was very desirous, as there is no Fact disputed, to go fully into the Argument *now*; and if I saw no Ground to doubt of the Bishop's Jurisdiction as Visitor, to stop unnecessary *Delay, Vexation, and Expence*.

The *Subject-Matter* of the Complaint to the Visitor is a Competition for *present* Maintenance and Education; upon an Eleemosynary Foundation: The *Cause* of the Contention is a *controverted Election*; which is too apt to engage and animate the Electors.

In Compassion to the Candidates, and for the Peace of this learned Body; the Dispute *ought not* to be suffered to continue longer than is absolutely unavoidable.

If the Plaintiff might, *as of Right*, demand to declare in Prohibition, the *Consequences* would be fatal, in both Universities. The College, as here, (i. e. the Majority which determines the Body,) would support the Election they had made, and may easily keep the Visitor off for Years; their public Stock would be applied to defray the Charge: In the mean Time, Elections of new fellows might come on; their Validity might depend upon the Rights in Dispute; the Election of Masters might come on; Great Abuses, in such a State of Confusion, would naturally creep in; Discipline could not be kept up; Intestine Heats and Divisions would counteract the whole Intention of the Founder. The Reason of a Visitor would be destroyed. He is appointed and made absolute upon *this* Principle, "That, in these Societies, Error of Judgment, the Chance of Partiality, or Injustice, is a *less Evil* than the Duration of Contention:" But if, by disputing His Jurisdiction without Ground, His Exercise of it may be protracted as long as a Cause can be kept up for Delay, by Parties who do not regard the Costs, The Members of every College in both Universities who complain of an Injury

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* jury done, must be subjected to *both* Inconveniences; 1st. To the * P. 200. Law's Delay, in the most deliberate Method of judicial Proceeding; and, at last, To the Award of an absolute Judge, in the most summary Method of Trial.

If We are clear "that the Bishop *has* Jurisdiction," We should do Injustice in the Present Case, and set a bad Precedent for keeping up Groundless Strife, if We did not *discharge* the Rule. And therefore I think, the Merits should be fully gone into *now*.

As to the *Merits*—

The 1st Question is "Whether the Bishop of *Ely* is Visitor of " *St. John's* College, as to the ELECTION of *Fellows* and other " Officers:" (For so is the Suggestion; where the Averment is " That He is not Visitor in THAT Respect;" And the Master and Senior Fellows make the Complaint.)

The 2d Question is, "Whether, supposing Him to have this " Power, as to the Fellows of the OLD Foundation, He has also " the like Power, as to Fellows of this NEW ANNEXED Foundation " of Dr. *Keton's*."

The Visitatorial Power, if properly exercised, without Expence or Delay, is *useful* and *convenient* to Colleges. However, (be that as it may,) We must take it, as it is now *established* by Law: And it is now settled and established, (since the Case of * *Philips* and * *Bury in Dom. Proc.*) " That the Jurisdiction of the Visitor is " *summary* and *without Appeal* from it."

* V. 4 Mod.
106.
Skinner 447.
Show. P. C.
35, &c.

These Foundations of Colleges are to be considered in *two Views*, viz. as they are *Corporations*, and as they are *Eleemosynary*.

As Eleemosynary, They are the Creatures of the Founder; He may delegate his Power, either *generally*, or *pecially*; He may prescribe *particular* Modes and Manners, as to the Exercise of *Part* of it. If he makes a *General* Visitor, (as by the general Words " *Visitator sit*,") the Person so constituted has all incidental Power: But he may be *restrained* as to PARTICULAR Instances. The Founder may appoint a *special* Visitor for a *particular* Purpose, and no farther. The Founder may make a *general* Visitor; And yet appoint an inferior *particular* Power, to be executed without going to the Visitor in the first Instance,

No *technical precise* Form of Words is necessary for the Appointment of either General or Special Visitor. In a Case before Lord *Hardwicke*, on 21st March 1747, *Attorney General v. Talbot*, in Chancery,

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* P. 201. * Chancery, "The Chancellor of the University was held to be "general Visitor of *Clare Hall*, without express Words of Appointment: But it was *implied*, from various Branches of the Visitatorial Power being expressly given to Him; from his having the Interpretation of the Statutes; and from an express Exclusion of the Founder's Heir." Therefore it must be collected from the *whole Purview* of the Statutes considered together, "WHAT Power the "Founder MEANT to give to the Visitor."

Under these general Rules, I will now consider the present Case, as it stands upon the Statutes of this College.

The Foundation of this College is to be taken (as to *this Question*) from the Statutes of Queen *Elizabeth*: Which are the *now* governing Constitution of this College. These Statutes *reserve* to the Crown the *Legislative* Power: So that the Case of ALTERING *the Statutes* is certainly excepted; *if* such Power *be included* in the Office of Visitor. But where a *Body of Statutes* has been given by the Founder, I should doubt extremely, Whether a Visitor *can* "alter those Statutes, or give new Laws:" (Whatever may have been the Notion in former Times.)

ALL OTHER Visitatorial Power is given to the Bishop of *Ely*, by the Statutes; and principally by the 2d Chap. De Electione Magistrorum, the 50th, De ambiguis interpretandis, And the 51st De Visitatore; (For the *Rest* of the Statutes are less clear and explicit than these are, as to the Proof of this Point.)

His Lordship then went minutely through these three Statutes, and shewed that they gave the Bishop of *Ely* the *general Power* of Visitation: Which He *specified* in many Instances, and particularly in the Words, "*Visitationem* hujus Collegij Episcopis Eliensibus "*commendamus*."

In the Case of *Green v. Ruthborforth*, in Chancery, 23d May 1750, Upon so much of these Statutes as was *then* shewn, Ld. *Hardwicke* gave his Opinion, "That the Bishop of *Ely* was *general* Visitor of "this College; but that He could *not* make new Statutes; and if "He should attempt it, the Jurisdiction would *devolve* to the "King's Courts, as in the *King v. Bishop of Chester*, the Case of "*Manchester College*, *Pasch.* the 1st of his present Majesty." *

* V 2 Strange
797.

More Statutes are *now* shewn; but nothing arises from them, to vary this Construction.

Nothing appears upon the *old* Foundation or the *other* Statutes, to impeach this Construction.

The

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* The Visitatorial Power is almost as strongly given Him by the * P. 202. old Statutes, as by the new: The Difference is, that in the new Statutes the Ambiguous Clause in Restraint of the Bishop's Power, towards the End of the old Statute de Visitatore, is * omitted.

* V. ante
188. com-
pared with
181.

What is there said does not restrain the Power of the Bishop of Ely, so strongly as may at first Sight appear.

The Meaning of the Provision seems to be, that he shall claim no Right as a *Co-Founder*, though he was Owner of the Site; but only act as in other Colleges, *where he is not* Founder. And in Colleges where He is not Founder, He may act under Powers of Visitation *delegated* to Him. However; be the Meaning as it may, this Clause is *totally omitted* in Queen Elizabeth's Statutes.

This is *not* the Case of *Expulsion*; where the Master and four senior Fellows are to * consent. The Power of *judging* and giving *Relief* upon *Complaints* and *Appeals*, is incident to the Office of General Visitor: And if this Case related to one of the *old Fellowships*, the Statutes have laid the Visitor under no Restraint, as to the Mode and Manner of exercising it.

* V. ante 181.

As *General* Visitor therefore of this College (which I think clearly the Bishop is,) He would certainly have Jurisdiction, if this Appeal related to One of the *old Fellowships*. Which brings me to the

Second Point—"Whether the Visitor of an *old* Foundation, has " the *like* Power and Jurisdiction over a NEW ANNEXED Founda-
" tion, as he has over the *Old* One."

It is a Question of Extent and Consequence.

In this College, there are 32 Original Fellowships; and 27, upon annexed Foundations.

I find that the *General Method* of *ingrafting* Fellowships, is by *Indenture* and *with a Clause of Distress*. I apprehend that this Method took its rise from the old Tenures by Divine Service, (which differ somewhat from Tenures in Frank Almoigne;) where the Donor had a Power of Distress, of Common Right, when the Service was certain. (But this is only a Conjecture.)

I have procured Information, concerning *most* of the Colleges in Oxford and Cambridge; And I find that *most of the OLD Colleges*, in *both* Universities, consist and are made up, (less or more,) of INGRAFTED Fellowships; and *ingrafted* BY INDENTURES, too:

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* P. 203. * And all these are considered as PART of the old Body; Unless there be any particular Exception, by the Terms of the new Foundation.

There was a Case (6th July 1740,) of University College in Oxford (founded by King Alfred;) where W^m. of Durham afterwards founded two Fellowships, "de proximis Dunelmiae Partibus." A Complaint was made to My Lord Chancellor, as GENERAL Visitor of the College in Right of the King: And it was determined against the College. Yet W^m. of Durham had in that Case, given NO Statutes Himself: But these ingrafted Fellowships were considered as subject to the general Visitor of the old Foundation. In that Capacity, Lord Hardwicke took Cognizance: And the College never made any Objection.

In the Case of the Attorney General v. Talbot, which I mentioned before, The Countess of Clare was Foundress of Clare-Hall. One Freeman annexed 2 Fellowships by Indenture, (I don't observe there is any Clause of distress in it.) The Contest was for one of these Fellowships. Lord Hardwicke held "That the Question belonged to the general Visitor of the College; that new Fellowships ingrafted must be subject to the Jurisdiction and Discipline exercised over the original Foundation."

In the Case of Dr. Green v. Rutherford & al. (which I mentioned before,) both Lord Hardwicke and Sir J. Strange expressly laid it down, "That new ingrafted Fellowships, if no Statutes were given by the Founders of them, must follow the original Foundation, and be subject to the same Discipline and Judicature."

I am satisfied that, upon mature Reflection, the College would tremble at the Consequence of leaving every Election into any of these ingrafted Fellowships, or any other Disputes concerning them, open to Courts of Law, and the Expence and Delay attending Suits in them.

I think clearly, that Dr. Keton did so consider and intend "that his new annexed Foundation SHOULD BE subject to the old Statutes and Constitution of the College, in Case he Himself should happen to die without making any Ordinance by Will or otherwise." These Fellows of his Foundation are to be elected as the other Fellows; and at the Time limited by the Statutes. They are to enjoy the same Liberties, &c, as the other Fellows. The Oath they were to take during the Life of Dr. Keton, "to obey such Statutes and Ordinances as should be made by Him," is qualified with this Restriction, "So that the said Statutes should be conformable with the Statutes of the Foundress of the said

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“ * said College”: Which necessarily implies that they were, in the * P. 204. first Place, to *obey* the Statutes of the Foundress of the College.

(He explained this, by many other Passages in the said Indenture.)

Besides, *EO NOMINE*, the *ingrafted Fellow* becomes *subject and liable* to the Jurisdiction of the Visitor *over the Fellows* of the College. These *ingrafted Fellows* are exactly *the same* as all the *Rest* of the Fellows, except as to the *Money* arising to them *from the New Foundation*; and are intitled to *all the like Privileges* as the *Old-Foundation Fellows* are intitled to.

The Objection to the Bishop's Right of visiting in the present Case, arises from the Power of *Distress* here given for the Forfeiture, in Case the College do not observe certain Terms which are prescribed to them.

But *several other ingrafted Fellowships* are just in the *same Situation*: And therefore it would go a great way, (in Point of *Consequence*,) if, upon this Ground, We were to determine them *NOT to be Part* of the old Foundation.

These are Provisions *DIVERSO INTUITU*. And indeed the *Distress* would be a very *INADEQUATE Remedy*, to the *Person injured*: Nor is it even *given to the Person injured*, but to *other Persons*. So that it is manifest, that this Clause of *Distress*, given to the *Church of Southwell*, ought not to take away the *SPECIFIC Remedy from the PERSON INJURED*.

It seems to me very clear, that the Bishop is as much Judge of *this Complaint*, as if it related to One of the *Old Fellowships*: And if it related to One of the *Old Fellowships*, I think the Jurisdiction of the Bishop, as Visitor, *most evident*. Therefore I am of Opinion, that the Cause shewn against this Rule is sufficient; and it ought to be *discharged*.

Mr. Just. *Denison* concurred, in the whole, with Lord *Mansfield*

He thought clearly, That the Bishop of *Ely* was *General Visitor*, except in the Instances particularly excepted.

No *particular technical Words* are necessary to create a Visitor. And so was the Opinion of the Court, in *Dr. Snape's Case H. 2. G. 2. B. R.* as well as in the Case of *Philipps v. Bury*. And the main Business of a Visitor, is to interpret the Statutes.

Now

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* P. 205. * Now this *Deed*, though with a *Clause of Distress*, cannot take away the Authority of the Visitor: It is for *another Purpose*. And Dr. *Keton* never meant to exclude his Scholars and Fellows from the *Benefit of an Appeal*, which the *other Fellows of the College* enjoyed. And his Fellows are sworn to observe ALL the Statutes of the College.

The Distress is very little more than the *Form* of the Conveyance; And it is given to the *Church of Southwell* too: But surely it is *not an ADEQUATE Satisfaction* TO the REJECTED Fellow, who has a Right to be elected into the Fellowship.

The Visitor has a Right to the interpretation of the Statutes; And the ingrafted Fellow has a Right to appeal to Him; And the Clause of Distress does *not take it way* from Him. And there is no manner of Reason why the *ingrafted Fellow* should not have the *same Privileges*, as the *other Fellows* have.

I am so clear about this Matter, that I think there is no Reason for suffering the Party applying for the Prohibition to *declare* in Prohibition: But the Rule ought to be *discharged*.

Mr. Just. *Foster* also concurred.

He took particular Notice of the 50th Chapter of Queen *Elizabeth's* Statutes, about interpreting what might be ambiguous or obscure. Which Statute, he agreed, does reserve to the Queen a Power to add or diminish, reform, interpret, declare, change, alter or dispense, &c: But the DOCTRINALIS *Expositio* is expressly given to the *Bishop of Ely*, in the very *same* Statute; and the College are thereby enjoined, in virtue of their Oath, and under Penalty of perpetual Amotion, to * obey his *Determination, Interpretation, and Declaration*.

* V. ante
185.

He declared that He had no Doubt that the *General Power* of Visitation is given to the Bishop: And He said, He saw no Inconsistency in the Statutes. As to the Clause of *Distress*—That would give no Sort of *adequate Satisfaction* to this REJECTED Fellow; who comes for a *specific Remedy* for the Injury done to him. Therefore He declared his Concurrence with Lord *Mansfield* and Mr. Just. *Denison*.

* N. B. Mr. Justice *Willnot* was not present at any one Part of this Motion; being engaged in the Court of Chancery during the whole of it.

And Per Cur. * unanimously
The RULE was DISCHARGED.

Earl

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* Earl of Bath *vers.* Abney, Spinster.

* P. 206.

Friday, 4th
February
1757.

A Case out of Chancery, for the Opinion of this Court.

The Question was, Whether an Executor of a COPYHOLDER for a TERM OF YEARS, was obliged to be *admitted*; (and, consequently, liable to *pay a Fine* upon such Admittance.)

The Manor in which the Lands lay, was *Stoke Newington*, in *Middlesex*; the Defendant, Mrs. *Abney*, is Lady of this Manor; the Premises demised, were 60 Acres of Meadow, let at 125*l.* per Annum.

The State of the Case was pretty long and particular: but the Question was short; *viz.* “Whether an EXECUTOR of a Tenant for YEARS, coming into the Copyhold, as a Chattel Real, under his Testator’s Will, is obliged to be *admitted*.” (For the Counsel for the Plaintiff, acknowledged that the being liable to a *Fine* would *consequentially* follow a Necessity of Admittance: That is to say, they admitted that *if* he was *compellable* to come in and be admitted, he would also be compellable to pay a Fine,)

The full State of the Case was in Substance this—

That *Henry Guy* being seised in Fee of 60 Acres of Meadow in the Manor of *Stoke Newington*, let at 125*l.* per Annum, the said *Henry Guy* surrendered the same to the Use of his Will: And having so surrendered (in a proper Manner) to the Use of his Will, He died seised in Fee; Having first duly made his Will and thereby devised to *John Taylour* and *Arthur Lake* their Executors and Administrators for 99 Years, if three Persons (in his said Will named) or any of them should so long live; upon several Trusts, *viz.* first, to the Use of the present Earl of *Bath*, for Life; then to his Issue Male, (*viz.* first an dother Sons, &c.) in Strict Settlement; then in the like Manner, to the use of the Earl’s Brother, General *Pulteney*; then to the late Mr. *Daniel Pulteney*, in like Manner; then to the Use of the Earl of *Bath* in Fee. And after the Death of the said Testator, the said *Taylour* and *Lake*, the Trustees, claimed to be admitted according to the Tenor of the Will; [*V. post.* 213.] and were thereupon admitted according to the Custom of the said Manor; did Fealty; and paid a Fine of 280*l.* to the then Lord of the Manor, on such Admittance.

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* P. 207. * One of the three Lives is since dead; the other two, living; And both of the said two Lessees, *John Taylour* and *Arthur Lake* are dead; but *John Taylour* survived *Lake*. *Taylour*, the surviving, (but now deceased) Lessee, appointed Dr. *John Taylour* and Another Person his Executors; and Dr. *Taylour* is now the surviving Executor of *John Taylour*, the Original and Surviving Co-Lessee.

Mrs. *Abney* is now Lady of the Manor.

It did not appear to the Lord or Lady of the Manor, that the Lessees, *Taylour* and *Lake*, were dead, till 1752: When this Fact was found by the Homage.

Then the Executor of the Survivor, (which was Dr. *John Taylour*, the surviving Executor of the said *John Taylour* the original Co-Lessee) was summoned to come in, and be admitted; the Jury having found that the original Lessees were both dead: And Proclamations issued &c. [N. B. The Proclamation was for the Heir of *Taylour* or other Person claiming &c, to come in &c.]

It is stated, that the General Custom of the Manor is, to grant the Copyholds for Life, or in Fee; and that No OTHER Instance of a Grant for YEARS, besides the present Instance (now before the Court,) has been known in the said Manor of *Stoke-Newington*.

The Case further states, that *Fines* have been usually paid upon Admission; And that the usual Rate of such Fines has been 1 and 1/2 Years improved Rent of the Premises to which the Tenant is admitted.

And by the Usage of this Manor, the Fine usually taken for two Lives, is as much and half as much, as the Fine for one Life: And the Fine usually taken for three Lives, is as much and half as much, as the Fine for two Lives.

The two Questions made upon this Case, and sent to this Court for their Opinion upon them, were 1st. Whether the surviving Executor of *John Taylour* (the Surviving Trustee of the Term for 99 Years) ought to come in, TO BE ADMITTED Tenant of the Copyhold Premises in Question: 2dly. In Case he ought, then Whether the Lady of the Manor will be intitled to any FINE upon such Admittance.

This Case was twice spoken to, in this Court: first, on Tuesday 18th May 1756, by Mr. *Pratt* for the Plaintiff, and Mr. *Sewell* for the Defendant; and a second Time, on Friday 4th Feb. 1757, by

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* by Mr. *Norton* for the Plaintiff, and Mr. *Gould* for the Defen-* P. 208.
dant.

And the two Questions being reduced into one, as is abovementioned, (it being agreed “that if the Executor was compellable to “be admitted, he would consequently be liable to a Fine:”)

It was argued on the part of the Plaintiff, the Earl of *Bath*, That the Fine becomes due to the Lord (or Lady) of the Manor, upon every *Change of the ESTATE*; not upon the *Change of the TENANT*, where there is *no Change of the Estate*.

For where there are several Remainders, to several Persons, the *Admission of the FIRST Taker* is the Admission of EVERY Person in Remainder. 4 Co. 22. b. *Copyhold Cases*; and 4 Co. 23. a. Case the 6th. *Cro. Eliz.* 504. *Gyppyn v. Bunney. Kitchen* 122.

And here, *Taylor* and *Lake* were admitted according to the Tenor of their Testator's Will: Which must have been to the *whole Estate* comprized in the Will. And therefore the *Fine* must have been proportionable to the Value of the *whole Term* of 99 Years: And 'tis against Conscience that the Executor of the deceased Lessee should pay *another Fine* for the *same Estate*. Neither is He compellable to come in and be admitted afresh; it being the *same Estate*.

And that *no fresh Admittance* is necessary, nor any *farther Fine* payable, appears from the Case of *Dell v. Higden* in *Moore* 358. and the Case *Tiping v. Bunning*, *Moore* 465. In both which Cases it was holden and resolved “that the Admittance of a Tenant for “Life, of a Copyhold, is an Admittance of Him in Remainder; “and that no new Fine is due from him in Remainder;” And in *Cro. Eliz.* 504. *Gyppyn v. Bunney* (which is S. C. with *Moore* 465.) *Popham* and *Fenner* held accordingly; and that, because They have but One Estate in Law: And they held that ONLY One Fine is due; which the first Taker shall pay.

In 3 *Lev.* 308. The Case of *Barnes v. Corke*—Tr. 1 *W. & M.* in C. B. It came directly in question; And *Ld. Coke's Diſſum* in 4 *Rep.* 23 a. was taken into Consideration, and explained to be restrained to SPECIAL Customs only: But the *general Principle* of Law was settled to be, “That no *Fine* is due to the Lord, from the Remainder-Man, *without a ſpecial Cuſtom* for it.”

And the Reason is, (as *Popham* ſaid, in the Case of *Gyppyn v. Bunney*,) “because Both have but one Estate in Law, And the “Lord has already admitted to the *whole*: Which Reasoning is quite applicable to the preſent Caſe.

If

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* P. 209. If a Copyholder in Fee grants his Copyhold upon Condition, and enters for the Condition broken; There shall be no fresh Admittance, nor Fine: because he is *in statu quo prius*. *Coke's Compleat Copyholder* § 56. So, if there be two Joint-tenants, and one die; the Survivor needs no Admittance, nor shall pay a Fine. *ibidem*. So the Widow of a Copyholder, for her Customary Free-bench: Because 'tis Part of the Old Estate, and is cast upon Her and vested by Law.

So it is also in Dower, and Tenancy by Curtesy; though there a *new Tenant* intervenes.

Noy 29. *Rennington v. Cole*, is full in Point. Also *Hutton* 18. *Jurden v. Stone*, S. C. *Hob.* 181. *Howard* against *Bartlet* S. P. 2 *Danv.* 184. Title *Copyhold*, Letter M. pl. 1. in Point. *Gro. Jac.* 573. *Waldoe v. Frances Bartlet Wid.* S. C. with *Hob.* 181. [but not this same Point.] 2 *Ro. Rep.* 178. *Walter v. Bartlet*, S. C. It is considered only as an *Excrescence* out of the Original Estate, by *Ld. Hobart*, *pa.* 181. And an Executor of a Copyholder for *Years* is within the same Reason; For 'tis only the *Old Estate* continued.

But the Case of DESCENTS may be objected: For there the *ESTATE* is the *same*; Only the *Tenant* altered.

Now it may be difficult to enter into the true Reason of this. But it may be considered as a Change of *Estate*; and as a new Grant: The Lord gave a new Admittance, a new Grant.

But perhaps that Case of Descents may be an *Exception* from the General Rule.

There are several Cases in Point, for the Plaintiff: And no Authority against Him, except *Weston's* Opinion in *Dedicott's* Case. *Dedicott's* Case itself, in 3 *Leon.* 9. is most express in Point: And *Dyer* 251. is S. C. [But *Dyer* does not mention this Point at all.] The Wife's Interest was there a Chattel-Interest; And She was to have it for 16 Years: And her second Husband, who survived her, had it as her Assignee, *without* paying any Fine, or being admitted. And in 3 *Leon.* 9. *Brown* and *Dyer* put the very present Case in Terms, of an Executor of a Copyholder for Years; and agree that He shall have the Term *without* Admittance. And the Case of *Otlery Monastery*, in 1 *Leon.* 4. and 4 *Leon.* 118. S. C. (twice printed, *verbatim* alike, almost,) mentions a Determination of the present Question, in Point: Agreeable to which, is another Report of it, called *Heydon's* Case, in *Moore* 128. S. C. *Egerton*, in his Argument, of that Case of *Otlery* vouches a Case as determined

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*in 8 *Eliz.* in *C. B.* : Which Case is expressly in Point with *Us.* But * P. 210. the Case *itself*, of 8 *Eliz.* in *C. B.* which he so cites, is not to be found. 2 *Danv.* 190. Letter Y, mentions *S. C.* *Sheppard's Court-Keeper's Guide*, 5th Edit. *pa.* 136. And *Calthrop's Readings on Copyholds*, 2d Edit. *pa.* 67. is expressly in Point : And so again, in *pa.* 72. Tenant in Dower and Freebench. *Tenures* 272, 273. *S. P.* accordingly : (the Book of Tenures that has no Name to it.) And *Comberbach* 445. expresses " that the Executors of a Termor for " Years of a Copyhold shall pay *no* Fine for Admittance."

They said that the Case of *Dell v. Higden* in *Moore* 358. was but a loose Note : And *Cro. Eliz.* 372. which is a Report of the very same Case, does not mention any such Question in it.

And as to what was cited out of the Case of *Gyppyn v. Bunney*, *Cro. Eliz.* 504. and *Moore* 465. They said it was no more than a Dictum of *Popham's*.

Then, if the Executor is *not* obliged to be *admitted*, No *Fine* is due : For no Fine is due, BUT UPON *Admittance*.

But the Inconvenience may be objected, " That a Lord may be " stripped of his Inheritance, by Copyholder's surrendering for *long* " Terms (as even for a Term of 1000 Years:)" And so the Lord might lose his Fines.

But 1st. This Inconvenience does *not really* exist at present : And 2dly. The Lord might in *such* Case *refuse* to admit ; And could not be forced to it, either in Law, or Equity.

2 *Bull.* 336. *Foorde v. Hoskins* proves " that the Copyholder cannot bring an Action at *Law*." [It is a most express Determination in Point.]

And in *Equity*, they would not assist the Copyholder in *such* an Attempt. *Comberb.* 445.

The present Case is a Lease to *Two* Persons, for 99 Years, determinable upon 3 Lives : In which, the Fine might easily, in *Fact*, be settled by a *proportional Computation*, if it could be done *by Law*.

The Copyholder derives his Estate, *not* from the Lord, but from the *Custom* of the Manor : For a Lord who is only Tenant for Life, may admit in Fee.

And that the Lord would *not be bound*, either in Law or Equity, to admit, upon a Surrender by a Copyholder in Fee, for 1000
H h h Years ;

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* P. 211. * Years; *Comberb.* 445. * expressly proves: And *also* proves "That
" in such a Case, an *Executor* shall pay NO *Fine* for Admittance:"
Which, it must be supposed, was taken down by the Reporter, as
Lord *Holt's* Opinion. [* This is no part of the Case of *Sandwell v.*
Sandwell; but manifestly, a quite distinct Case; probably, at *Nisi*
prius.]

The Lord's Interest in his Fine is sacred: An Act of Parliament
shall not be construed so as to deprive Him of it. [*V. Manwood's*
Diversity, in *Moore* 128.]

It would be very hard on our Side, if 1 and $\frac{1}{2}$ Years Rack Rent
was to be paid upon every Change of an Executor.

Therefore they prayed a Certificate in the Plaintiff's Favour.

On the Part of Mrs. *Abney*, Lady of the Manor, It was agreed,
that, in this particular Case, the Fine and the Admittance must de-
pend on *each* other; i. e. that *either Both* might be required, or
neither could.

But it was said that the Reason of Admittance, in general, de-
pends upon the Relation that subsists between Lord and Tenant:
And that the *Admission* of the Tenant, in these Cases, was *per-*
sonal to the Tenant Himself only; And the *Estate* depended
upon the Will and Pleasure of the Lord. He might originally,
admit *whom he pleased*, on the Decease of a Tenant. Indeed, at
length, a *Sort of Claim* in the Heir at Law, to succeed to his An-
cestor, became established by *Custom*. However, a *great deal* STILL
remains in the Lord's Power and Discretion: And the Tenure is
still (strictly) at the *Lord's Will*.

It was always necessary that the new Tenant should *personally ap-*
pear: And it so remains still, to this Day; He must pay his Fine,
and do Fealty *in Person*. *Co. Copyholder*, § 19. and 4 *Rep.* 22. b.
&c, to the like Effect.

And they forfeit, if they grant Leases without Licence. 4 *Co.*
Copyhold Cases. 9 *Rep.* 76. a. *Combe's Case*.

And they must be Persons *capable* of being admitted: For it is
impossible to admit One who is *incapable* of Admission.

Now No Man is Heir or Executor to the Tenant *during* the
Tenant's Life. Therefore the Thing itself is impossible, "that the
" Admission of the first Tenant should be an Admission of THEM
" *also*, as Heir or Executor to such first Tenant."

" The

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* The "Change of ESTATE, and *not* of Tenant, cannot be the * P. 212.
" true Ground of the Fine to the Lord." For that Notion would
let in many Inconveniences: And it would be most unreasonable
that One *single* Fine to the Lord should answer to *all* Changes of
the Tenant.

The Remainder-Man may be Tenant for *One* Purpose; *Not* for
another. Co. 4. Rep. 23. a. b.

Admittance *precedes* the Fine; and is the *Cause* of it. It is ne-
cessary, in order to intitle the Lord to a Fine. And this appears to
be the Sense of the Legislature, by 9 G. 1. c. 29. "An Act to en-
able Lords of Manors more easily to recover their Fines &c." And upon Admittance, a Fine is due. And 1 Mod. 102 & 120. *Blackburn v. Graves* proves that the Lord shall *still* have his Fine; *although* the Admission of the particular Tenant *be* the Admission of the Remainder-Man. It does not follow, that because the Estate is *vested*, therefore there shall be *no* Admittance or Fine: For upon *Descents*, (where there is no doubt but that a Fine is payable,) Yet the Estate is *undoubtedly* VESTED in the *Heir*. And *Coke's Complete Copyholder* § 56. * page 63, is express in Point "that he in Remain-
der shall be admitted, and pay a Fine; *although* his Estate was
vested by the Admittance of the Tenant for Life."

In the Case of *Barnes v. Corke*, 3 Lev. 308. The principal Que-
stion, they said, was upon the *Forfeiture*; and that the other Points
were only * *incidental*. [But the 1st Point was (in Terms) "Whe-
ther a Fine was due."]

In the Case just now mentioned, stiled *Batmore & Ux' v. Graves*, * V. 3 Keble
in 1 Ventr. 260. Or * rather *Blackburn v. Graves*, as it is called in ^{263, 329.}
1 Mod. 102 & 120. S. C. It was determined "That the Admission
of Tenant for Years was an Admittance of him in Remainder,
and occasioned a *Possessio Fratris*:" And it is there resolved, that
the Admission of the Tenant for Years, though it is an Admittance
of Him in the Remainder, yet shall NOT *prejudice the Lord*, as to
the Fine from the Remainder-Man. And 1 Ventr. 260. is express
and plain, "That the Remainder-Man *must* pay a Fine, *when* his
Estate comes in *Esse*."

Indeed, where the WHOLE Fine *has been already* PAID to the
Lord upon the *first* Admission, there is no Reason why it should be
paid *over again*: And the Remainder-Man is in fact admitted, in
such Case. But where the Fine is NOT paid for the WHOLE, upon
the *original* Admission; there, the Remainder-Man *must* pay a
Fine, and *must* be admitted. [V. 1 Ventr. 260. and 1 Mod. 120.
where

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* P. 213. * where this Matter seems to be put upon a right and reasonable Foot.]

If the Remainder-Man dies during the Life of [the Tenant for Life, *his Heir* shall be admitted and must pay a Fine. Therefore the Payment is for Lives *in being*; And the Fine is payable upon the Change of the *Tenant*: And the Admittance *does not extend* beyond the PERSONS of the Tenants admitted. They are *still* only Tenants at WILL. *Co. Copyholder*, § 14. § 32. § 41. expressly. 4 Rep. 22. b. S. P. in Point, accordingly. And the Estate is only vested in the Tenant *personally*.

In the present Case, The Persons originally admitted, prayed to be admitted “*according to the Tenor of the Testator’s Will*,” and it was granted to them, according to the Custom of the Manor: There is nothing said of *their Executors*. And they were admitted *as Trustees*, and not for their own Benefit: And their Admission was only *personal*.

The Admittance of an *Heir* is very different. *Compleat Copyholder*, § 41. 4 Rep. 22. b.

The *Heir* has very considerable Interest, *before* Admission: Yet *he* must be admitted.

As to Tenants *pour autre vie*, they shall be admitted, and pay Fines. *Co. Copyholder*, § 56.

All who allow of a *general* Occupant, say *he* must be admitted: And there is no Doubt but that a *Special Occupant* must be admitted and pay a Fine.

Wherever a Right is transferred, upon *Death*, there must be an Admittance. .

A Termor may die *intestate*, and have *no* Administrator; Or may make a Will, and the Executor *renounce*: And shall the Lord have *no* Tenant? Surely, in these Cases, the Lord shall not be *without ANY Tenant at all*.

An *Assignee* of a Term shall pay a Fine; So, a *Devisee* of a Term; Indeed, *every new Tenant* shall pay: A *Mortgagee*; An *Assignee* of a Bankrupt; the *Heir of the Assignee*; In short, *Wherever* there is a *Change of TENANT*.

If it depended upon the Change of *Estate* only, an Estate in *Fee* would NEVER pay.

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* *Dedicott's Case* is strong for the *Defendant*.

* P. 214.

Dyer 251 explains 3 *Leon.* 9. The Husband, it appears by *Dyer*, was not the Personal Representative of his Wife: For she had an Administrator, appointed by the Ordinary. In 3 *Leon.* 9. there was, as he reports it, an *Obiter Dictum* of two Judges, indeed; but contradicted by another. In *Dyer*, it appears that the Husband held in, in Right of his Wife: And the Dispute was between the Wife's Administrator, and the Husband. The Husband was possessed jointly with the wife, on his Marriage; And He only *continued* in Possession. *Executors* may be considered as *Assignees*, (the rather as Copyhold Estates are not Assets :) But the Husband could not, in this Case of *Dedicott*, be considered as Assignee. In 5 *Rep.* 18. a. Lord Coke cites 29 *E.* 3. 48. and 30 *E.* 3. 14. *Simpkin Simeon's Case*; By which it appears "that the Baron is *not Assignee* to his Wife;" In *Dedicott's Case*, there was *no Transmission* of Estate. It is like the Case of *Joint-tenants*; where the Survivor shall not pay. *Co. Copyholder*, § 56.

Calthrop's Reading 67. is plainly the same Case with 3 *Leon.* 9. and *Dyer* 251. *Hauchet v. Rose*; As appears by the Margin of *Dyer*, and by the End of the Case itself too. It is only a Scrap, out of *Leonard*.

As to the Case of *Otlery Monastery*, reported in *Moore* 128. and in 1 *Leon.* 4. and 4 *Leon.* 117. (S. C. in Terms) and the Case of 8 *Eliz.* there cited by Mr. Solicitor General *Egerton*; there was no Question between Tenant and Lord: And *Egerton* plainly means *Dedicott's Case*, and the *Dictum* there mentioned. For *Dedicott's Case* was in C. B. and was in 7 *Eliz.* according to 1 *Leon.* 9. and H. 8 *Eliz.* according to *Dyer*.

As to *Noy* 29. *Rennington* against *Cole*—The Custom of the Manor was for the Wife to hold *durante Viduitate*: And the Wife's Estate *durante Viduitate* was "but a Branch of the Husband's Estate," (as is rightly there said *Hobart*.)

As to *Hob.* 181. The Case of *Howard v. Bartlet*,—The same Custom is stated: And the Husband's Estate was holden not to be merged; And the last mentioned Case, of *Rennington v. Cole* was there taken Notice of and cited by Lord *Hobart*.

As to *Comberb.* 445. it is a mere short, loose, *Nisi-prius* Note: Neither the Book itself, nor this Note in it, are of any Authority. And *non constat* whose Opinion it is, that the Note mentions. If it were good Law, it would render All Family-Settlements ineffec-

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* P. 215. * tual: For he asserts "That the Surrender may be for a thousand Years, and that the Executor shall pay no Fine." At this Rate, the Granting Copyholds for Terms of Years would be, in Effect, infranchising them.

We are not now upon any *special* Custom of a Manor; but upon the *GENERAL Custom of Manors*: Therefore the Cases upon *particular* Customs are not applicable to the Present. The Collateral Qualities of Dower, Freebank, &c, are not incident to Copyholds; but depend upon Special Customs. In *this* Manor, the Fines are uncertain: But 1 and $\frac{1}{2}$ Year's Value of the Nett Year's Rent has been *generally* taken, for One Life; $2\frac{1}{4}$ Years, for two Lives; And for 3 Lives, half as much more.

And Regard ought to be had to the Fine paid on the last Admittance.

	l.	s.
* 1 Year	125	0
$\frac{1}{2}$ a Year	62	10
1 Year & $\frac{1}{2}$	187	10
$\frac{3}{4}$ of a Year	93	15
2 Yrs. & $\frac{1}{4}$	281	5

This Estate was of the Value of 125 l. *per Ann.* when the two Tenants *Taylor* and *Lake*, the first Lives, were admitted; And the Fine paid (*viz.* 280 l.)* answers to the two Lives admitted, according to the abovementioned Rule: And the Length of the Term is of no Consequence. *These two* Persons therefore were the Tenants: *After their* Death, The Lord has *no* Tenant: It makes no Difference, Whether the Admittance be for *Lives*; or for a Term of Years *determinable on Lives*.

Upon the Usage stated on this Case, a proportionable Sum is to be paid for a Fine, according to the Number of Lives. And this is a just Rule, and the best Rule: And it is better to keep to *this* Rule, than to Form a *new* Rule, upon a Suit in Equity "to compel the Lord to admit."

The Point turns merely and entirely upon the Change of *Tenant*. If it were otherwise, Lords of Manors, nay even jointured Ladies of Manors, might make voluntary Grants, and incumber their Posterity, *ad libitum*. The Lady of *this* Manor is Lessee under a Prebendary: And Consequently, such Lessee (though she were only so for one Year) might admit for 500 Years, without any fresh Fine, upon *their* Principles; and so *defraud* the original Owner of the Manor in Fee. It would take it out of the restraining Statutes of Queen *Elizabeth*.

The first Admission was in 1709; [*viz.* the Admission of the two Lives who were admitted according to the Tenor of the Testator's Will.]

REPLY,

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* REPLY, on the Part of the Plaintiff.

* P. 216.

The Dispute between Us is, “*Upon WHAT Principle, Fines are due to the Lord.*”

They say, “*On the Change of Tenant.*” We say, “*On the Change of Estate, only.*”

They argue the Admittance to be *personal*; And urge it, from the doing *Fealty*, at the time of Admission.

We agree, this was so *originally*: But We say the Admittance is not always *personal*, *now*. The Cases of Dower, and of Tenant by Curtesy prove this: For *neither of these* Tenants appear personally, or do Fealty. And the Case of *Barnes* against *Corke*, in 3 Lev. 308. alone proves the same thing

And *Ld. Coke*, in his *Copyholder*, agrees “that the *Heir* would not need to be admitted, if it were not on Account of the Lord’s Fine.”

And all the Remainder-Men are admitted under the original Admittance, *till* a Descent: But We agree that *Whenever* a DESCENT happens, the Lord *shall* have a Fine.

The gradual Diminution of Fines, on admitting for several Lives, seems to shew that only one Fine is due; And that that Fine is payable on the *first* Admission.

The Case of an *Occupant pour autre vie*, is a *NEW Estate*: For the old Estate is gone; though the Grantor is *estopped* to take against his *own* Grant, (which extended beyond the Life of the Grantee himself.)

As to the *Assignee of a Term*—He can only come in by Surrender and Admittance: Which is a *new Estate*; And he can have *Nothing* TILL Admittance.

So, in Case of a *Mortgage*, The Mortgagee comes in under a Surrender: Which makes a *new Estate*.

So, in Case of an *Assignee of a Bankrupt*. And the Act of Parliament of King *Jac. 1.* requires the Assignees coming in thus: It takes express Care of the Lord’s Interest. [*V. 13 Eliz. c. 7. 1 J. 1. c. 15. 21 J. 1. c. 19. and also Co. Copyholder, § 56. pa. 62. at the very Bottom.*]

The Case of a *Devisee*, is likewise undoubtedly a *new Estate*.

And

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* P. 217. * And in Case of the Executor's renouncing, or of no Administration being taken out, still the Lord will *not lose* his Fine.

In Case of a Woman's *Free Bench*, there is a Change of *Tenant*. So in a *Tenant by Curtesy's* Case.

As to the Case in *Dyer* 251. the Husband is a *new Tenant*, 'tis true: But the *Estate* is the *same*.

Just so here, in the Case of an *Executor*, the *ESTATE* remains the *same*.

Probably the Case mentioned by Mr. *Calthrop* is the same Case with that in *Dyer*. But still Mr. *Calthrop's Opinion* stands uncontradicted: And it is confirmed by Lord Ch. J. *Holt's* Dictum, and by the *Tenures*, and by *Danvers*. [*V. ante* 210.]

As to the *Quantum* of the Fine—They say the original Fine was taken *only* as an Equivalent for *two* Lives; and that therefore *another* ought now to be paid, as an Equivalent for a third.

[N. B. The Fine for 2 Lives, is the Sefqui of that taken for One; and the Fine for 3 is Sefqui of that taken for Two; by the Usage of this Manor. V. ante 207.] But the Fine usually taken in this Manor, where a third Life is added to two former ones, is *only* the Fine upon two Lives, and *HALF as much more*.

Whereas they *now* demand a *WHOLE* Fine: And they might just as well demand it, if only a few Years of the Term remained unexpired.

As to the *Inconveniences*, The Lord *cannot* be compelled to admit, either by Law, or in Equity, without the Tenant's paying a reasonable Fine to the Lord.

And a *temporary* Lord *can never infranchise* the Tenants Estates, *by Collusion*: For that would be a *VOID Grant*, and would be considered as a *voluntary* Admission, which would not prejudice the Capital Lord.

This is owing to the Modern Fashion of introducing long Terms, unknown to our Ancestors and to our old Law: Which None but the Parliament can change.

Perhaps it would be no bad Policy, if *All* Copyholds were enfranchised. However, though a Lord *may* grant a Copyhold for a Term of Years, Yet He is *not compellable* to do so: It is voluntary; the Lord is *NOT obliged* to admit for *Term of Years*.

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* Here, They are admitted “ *according to the Tenor of the* * P. 218.
“ *Will:*” For *so* they pray it; And their Prayer is granted. [V.
ante 206.]

The Law is clear, “ That *no Admission* of the Remainder-Man
“ is necessary.”

And there are no Inconveniences attending such a Determination,
but what the Lord himself may obviate.

The COURT took Time to advise; and after advising, to
certify.

And, about a Fortnight after the End of this Term, they gave
their Certificate: Which is here subjoined.

N. B. What is said by *Hales* and *Wylde*, in 1 *Mod.* 120. and
1 *Ventr.* 260: Seems to be the Justice of the Case.

The OPINION of the Court of King's Bench on the Case
stated, upon the following Questions, *viz.*

1st. Whether the surviving Executor of *John Taylour*, (the sur-
viving Trustee of the Term of 99 Years,) *ought* to come in, to be
admitted Tenant of the Copyhold Premises in Question?

2d. In Case he ought, Whether the Lady of the Manor will be
intitled to any *Fine* upon such Admittance?

Having heard Counsel on both Sides, and considered of this
Case, We are of Opinion “ That the surviving Executor of
“ *John Taylour*, (the surviving Trustee of the Term of 99
“ Years,) *OUGHT to come in to be admitted* Tenant of the
“ Copyhold Premises in Question; and that the Lady of
“ the Manor *WILL be intitled to a Fine* upon such Admit-
“ tance.”

24th February 1757.

MANSFIELD.
T. DENISON.
M. FOSTER.
J. E. WILMOT.

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* P. 219. * Sir John Trelawny Bart. *vers.* Bishop of Winchester.

Saturday 5th
February
1757.

Hil. 26 G. 2. Roll. 868.

(Lord Commissioner Wilmot absent in Chancery.)

IT was an Action of Debt for 600 *l.* for 5 Years Salary of several Offices, *viz.* *Great or Chief Steward to the Bishoprick*, and all it's Castles Lordships Manors &c; and *Conductor of the Men and Tenants of the Bishop thereof*; with a Salary of 100 *l.* per Annum; And of *Master Keeper or Preserver of the wild Beasts in all the Forests, Parks, Chases and Warrens* belonging to the Bishop, and Chief Governor of all Birds Fish and Beasts of Warren &c, (commonly called *Chief Parker*;) with a Salary of 20 *l.* per Annum: Which Offices and Salaries were granted to the Plaintiff by Sir *Jonathan Trelawney* Bart. late Bishop of *Winton*, by Letters Patent, with Clause of Distress if unpaid.

* See the last
Clause of that
Statute:
Which He
pleads verba-
tim, as infra
220 and 221.

The Bishop pleads the * Statute of 1 *Eliz. c. 19.* And also that the Offices aforesaid are *not ancient* Offices of the Bishoprick, nor were *usually granted for Life*; and that the said Fees are *not the ancient Fees*; and that the said Offices are *useless and merely nominal*, and *no Duty or Service* to be done for or in respect of them; And that the Grants are Grants of Hereditaments Parcel of the Possessions of the Bishoprick &c.

The Plaintiff replies That they *are ancient* Offices; and the Fees, the *ancient Fees*; and that they have been *usually granted for Life*: *absq; hoc* that they are *useless and merely nominal*.

The Bishop rejoins That the Offices *are useless and merely nominal*, and without any Duty or Service to be done for or in respect of them; in Manner and Form as &c. And Issue is joined thereon.

The Special Verdict finds, That the Offices of *Chief Steward*, and of *Conductor* of the Men and Tenants of the Bishoprick, ARE ANCIENT Offices of the Bishops; and HAVE BEEN ANCIENTLY AND USUALLY granted for Life, with an Annuity; and that the Annuity of 100 *l.* IS THE ANCIENT FEE.

That the same were granted to the Plaintiff, by *Jonathan* late Bishop of *Winchester*, on the 4th July 10 Qu. *Anne*: Which Grant was approved by the Dean and Chapter, and confirmed by them.

That

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* That the Plaintiff thereby became seised, and is still seised * P. 220. thereof; and RECEIVED *the Annuity* during the Life of *Jonathan* late Bishop of *Winton* (the Grantor,) and of his Successor *Charles* (*Trimnell*,) and of his Successor *Richard* (*Willis*,) and also during *the FIRST ELEVEN Years* of the *present* Bishop's Time (*Dr. Benjamin Hoadley*;) And that five Years Annuity, ending at *Michaelmas* 1751, remains unpaid.

Then they find (verbatim) the * private Statute of 1 *Eliz. c. 19.* * 'Tis No. 40. [See *Moore's Reports* 107: and *post* 221.] By the last Cause of which Act, " All Gifts, Grants, &c, made by any Arch-Bishop or " Bishop, of any Honours, Castles, Manors, Lands, Tenements, " OR OTHER *Hereditaments* being Part of the Possessions of his " Arch-Bishoprick or Bishoprick, or united *appertaining or belong-* " *ing* to any the same Arch-Bishopricks or Bishopricks; to any " Person or Persons, Bodies Politic or Incorporate, (Other than to " the Queen's Highness her Heirs and Successors;) *whereby any* " *Estate or Estates shall or may pass from the said Arch-Bishops or* " *Bishops* or any of them, (other than for the Term of 21 Years " or THREE Lives, from such Time as any such Lease, Grant or " Assurance shall begin, and whereupon the old accustomed yearly " Rent or more shall be *reserved and payable* yearly during the said " Term of 21 Years or three Lives;) shall be *utterly void* and " of none Effect, to all Intents Constructions and Purposes; " any Law Custom or Usage to the contrary in any wise notwith- " standing

That these Offices, at the *Time of the making* of this Act, and *now*, are MERELY NOMINAL, and no *Duty* Attendance or Service to be done for or in respect of them or either of them; in Manner and form as the Bishop has alledged.

But Whether, &c.

As to the *other* Office (of *Master- Keeper* of all the Beasts in the Parks, or *Chief Parker*,) They find That *that* is NOT an ANCIENT Office; and that the Bishop for the time being hath NOT *anciently and usually* granted it, nor the Annuity for the Life of the Grantee; And that *that* Office also was, at the time of making the Act, and still is an Office MERELY NOMINAL; And that *no Duty*, Service, Work, Labour, Attendance or Business ever was or is, &c.

The Question upon this Special Verdict, was, " Whether Sir " *John Trelawney*, the Grantee was intitled to hold the two first " mentioned Offices, and to recover these Arrears against the *pre-* " *sent* Bishop." As to the last-mentioned Office (of Chief Parker) the

Hilary Term 30 Geo. 2.

* P. 221. * the Facts found by the special Verdict made an End of any Question concerning it : And the Point was given up.

This Case was first argued, upon *Tuesday* 27th of *January* 1756, by Mr. *Salisbury Brereton* for the Plaintiff, and Mr. *Pratt* for the Defendant.

[* 8, 9 W. 3. c. 11 § 6. relates only to Plaintiffs or Defendants dying after interlocutory Judgment, and before final.]

Note—Sir *John Trelawney*, the Plaintiff, * died during the Time of the first Argument : But, as the Demand was for Arrearages, this Event did not prevent the Court from proceeding to hear the Arguments.

On *Tuesday*, 1st *February* 1757, It was again very fully argued by Mr. *Norton* for the Plaintiff, and Mr. Solicitor General (*Yorke*) for the Defendant.

Lord *Mansfield* said he was ready to give his Opinion *Now* : But as Mr. Justice *Wilmot* had heard the first Argument, He chose to report to him what had passed upon this, and to know his Sentiments, before Judgment should be given : And therefore ordered it to stand over till *Saturday* then next.

And, this Day, His Lordship gave the Resolution of the whole Court ; after having first stated the Case, to the Effect as above, &c.

Lord *Mansfield*—At *Common Law*, a Bishop, with the Confirmation of his Dean and Chapter, might exercise every Act of absolute Ownership, over the Revenues of his See ; and bind his Successors, as much as Tenant in Fee can bind his Heir.

By the Statute of 1 *Eliz.* c. 19. “ All Gifts, Grants, Feoffments, Fines and other Conveyance, or Estates, FROM the first Day of that Parliament, had, made, done or suffered, or to be had, made, done or suffered, by any Arch-Bishop or Bishop, of any Honors, Castles, Manors, Lands, Tenements, or other Hereditaments, being parcel of the Possession of his Arch-Bishoprick or Bishoprick, or united, appertaining or belonging, to any of the same ; to any Person (other than to the Queen, her Heirs or Successors;) whereby any Estate should or might pass from the Arch-Bishop or Bishop, OTHER than for the Term of 21 Years, or three Lives, from such Time as any Lease, Grant or Assurance shall begin ; and whereupon the old accustomed yearly Rent or more, shall be reserved, payable yearly during the said Term of 21 Years or three Lives ; shall be UTTERLY VOID ; any Law, Custom, &c, notwithstanding.”

Patents or Grants of Offices, with Fees, Salaries, or Profits annexed to them, are not mentioned in the Act : There are no general Words

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* Words adapted to the Case of Offices. And yet, there was not * P. 222.
a single Bishoprick, at that Time, *without* some Office granted.

Had the Legislature meant to restrain the *Re-granting* them, as they should drop in, It must have been done by a *Special Provision*, with an *Exception* of some, at least of Judicial Offices. As the *general Restraint* is not extended to the Case; there was no Occasion to make *Exceptions*.

CONTINUING ancient Offices, with the ancient Fee, in the usual Manner, was not a *Dilapidation* of the Revenue of the Bishoprick. Every Bishop left this Power to be exercised by his Successor, as his Predecessors left it to be exercised by him. Such Grants bring no new Charge upon the Bishoprick: Which only remains liable to the same Fees or Salaries, to which it was liable before.

The Act has no *Retrospect*, as to any Charges or Incumbrances whatsoever, brought upon the Revenues of the Bishoprick, before the first Day of that Session (23 January 1558.)

So little were OFFICES thought within it, that the Bishop of Ely, on the 20th of April 1558, made a new Grant of the Office of keeping his House and Garden, (Which was never granted before,) with a Fee or Salary of 3 l. a Year. This came in Judgment in H. 10 Eliz. Ro. 758. As cited in Ley 78. * It was holden good; because the Office was thought to be a necessary Office, and the Fee reasonable. Which is the proper Measure whereby to judge, "whether it was an indirect Alienation, under Colour of a new Grant:" Though it was extraordinary, to hold this Office necessary, or the Fee reasonable; or indeed, to imagine that any Office could be necessary, which never existed before. However, that Determination has been esteemed good, and acquiesced in.

The next Case was in Trinity 30 and Hilary 31 Eliz. (cited in 10 Co. 61. b. and Ley 72 & 75.) The Bishop of Chester granted five Marks for Life, *pro Concilio*, &c. to Bolton: and Bolton averred that his Predecessors had granted reasonable Fees, but did not aver this Fee ever to have been granted before. The Opinion of the Court was against the Plaintiff; So he never had Judgment: And the Reason of the Opinion was, "that this was a voluntary Thing, and not an Office."

At last, in the 43d of Eliz. the true Distinction seems to have been taken, (in Ley 75;) Where the Arch-bishop of Canterbury granted the Office of Surveyorship, with the ancient Fee, and more: It was holden void, on account of the NEW Addition. That was an Injury to the Successor.

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* P. 223. * In the first Year of the Reign of King *James* the First, The Legislature had this Act, and the subject Matter of it, under Consideration. The 1 *Jac.* 1. c. 3. extends to the *King*, that Restraint which the first of *Eliz.* laid upon Grants made by a Bishop to a *Subject*. But *though* Questions had arisen upon Grants of Offices; *though*, in Fact, during the whole long Reign of Queen *Elizabeth*, the Bishops had re-granted their ancient Offices as they fell in;— Yet, the Legislature did not interpose; and therefore meant that *this Power should continue*. They were satisfied with the Distinction of the Arch-Bishop of *Canterbury's* Case, in the 43d of *Eliz.* “ That “ no *new* Charge could be brought upon the See.

From the 10th of *Eliz.* (the Time of the Bishop of *Ely's* Case,) to this Day, No Grant of a *new* Office, with a *new* Fee, ever was held to be good. Such a Grant is within the Meaning of the 1st of *Eliz.* by Construction; because it is a *colourable Alienation*; and under that Pretext, the whole Statute might be *evaded*.

From the 1st of *Eliz.* to this Day, there is no Case, where the *Re-grant* of an Office in Being before the first of *Eliz.* in the usual Manner, with the *ancient Fee*, was adjudged to be within the Restraint of that Statute.

If these Grants are not within the Statute, but stand as they did at Common Law; the *Utility* or *Necessity* of them can never be material. A Bishop, at Common Law, with the Confirmation of his Dean and Chapter, might bind his Successors by Grants from which they could have no Benefit.

There is no Case since the 10th of *Eliz.* that has judicially turned upon the *Utility* or *Necessity* of the Office: The only Question has been “ Whether the Grant was agreeable to the *Usage* before the “ first of *Eliz.*”

The Bishop of *Salisbury's* Case (10 Co. 58. b.) T. 11 *Jac.* 1614, came before the Court upon a Demurrer. It is not alledged in the Pleadings of either Side, “ that the Office was, or was not, *necessary*.” The Plea in Bar to the Avowry was, singly, “ that the “ Office *never* was granted *before*, beyond one Life:” And the
* 10 Co. 62. a. Grant was holden good. In the 5th Resolution, * It was resolved “ That the Grant of an *ancient Office* to One, with the *ancient* “ Fee, by a Bishop, shall not bind his Successor; *unless it be confirmed* by the Dean and Chapter: For SUCH Grants are *not*, as appears before, restrained by the Statute of the first of *Eliz*; and “ therefore *remain at the Common Law*, and by Consequence ought “ to be confirmed by the Dean and Chapter.” If so, The *Utility* or
Necessity

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* *Necessity* of the Office was not at all material : For, by the *Common* * P. 224. *Law*, the Utility or Necessity of an Office was *no* Requisite towards Rendring the Bishop's Grant of it (confirmed by his Dean and Chapter) good and valid.

The Bishop of *Chichester's* Case, * in *Cro. Car.* 47. and *Ley* 71. (2 *Car.* 1. *Anno Dom.* 1626.) came before the Court upon a Demurrer too—There is no Allegation in the Pleadings on either Side, as to the Office being *necessary*, or not : The Question turned *solely* upon the *Addition* of a *new Fee*. * Gee, Bishop of Chichester, v. Freedland.

The Case of the * Register of *Rockester*, in *Cro. Car.* 557. *Hil.* 14 C. 1. *Anno Domini* 1639. came before the Court upon a Special Verdict. There is not a Word as to the Office or Reversionary Grant being *necessary* : but it is found to have been *usually* granted in Reversion ; And *therefore* the Court adjudged such a Grant in Reversion to be good against the Successor. [* Young v. Fowler, *Cro. Car.* 555. March 38. 2 Ro. Abr. 153. pl. 7, 8. 154. pl. 5. See also Sir William Jones in the same

311. Yonge v. Stowel, Tr. 8 *Car.* (in an Action upon the Case, for disturbing the Plaintiff in the same Office,) S. P. accord.]

Thus stood the Construction of this Statute, upon the Reason and Words of the Law, Practice, and Judicial Determinations. But it happened that, *besides the real Ground of the Judgment*, in the Bishop of *Salisbury's* Case, they echoed the *Reasoning* of the Bishop of *Ely's*, *without distinguishing* the essential Difference between the two Cases ; and * laboured to prove, “ that the Office was *necessary*.” * V. 10 Co. 61. a. b.

Under the great Authority of the Reporter, the same Reasoning is repeated in the subsequent Cases : and where the Grant is good, because it was *warranted by the Usage* before the 1st of *Eliz.* they needs must, *ex abundanti*, labour to shew, “ that the Office is *necessary*,” by Arguments so inconclusive, and so contradictory, that One is sorry to read, or repeat them. “ It is necessary to grant for one “ Life ; but not necessary to grant for two, or in Reversion ;” And then, “ It is necessary to grant in Reversion ; that when the first “ Life drops, there may be another immediately to fill the Office.” Whereas in *real Truth*, Few of these Patent Offices (except the Judicial) are *useful*, or *necessary* in any Sense ; Fewer are necessary, or even expedient, to continue *beyond* the Bishop's *own* time ; None necessary (by any Colour of Argument) to be granted in *Reversion*, or for *more than One Life*. But if they *existed before the 1st of Eliz.* they are NOT *within* the Statute, they are governed by the *Common Law* : And *therefore* Grants of them bind the Successors, *how useless* soever they may happen to be.

The

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* P. 225. * The next Case that was mentioned, was the Case of *Ridley v. Pownall*, 2 Lev. 136. 27 C. 2. * There the *Special Verdict* found the Office to be a *necessary* Office; (which is the *first Instance* where it appeared Judicially to the Court, "that the Office was necessary;") and that it had been *separalibus temporibus*, since the Foundation of the Bishoprick, granted for 3 Lives.

[* This was an Action upon the Case, in B. R. for disturbing the Plaintiff in his Office of Register to the Bishop of Bristol, (a new Bishoprick founded temp. H. 8.) See 3 Keble 472, 506, 540, 560. S. C.]

My Lord *Hale* (who distinguished what He read, and thought and reasoned from Himself) says "*Before the first of Eliz.* there was no Difference between the Grant of Offices, of *ancient* and *new* Bishopricks: Both made *their Grants*, AS OWNERS; and if they USUALLY granted for Three Lives *before* the Statute, they may grant so *after*. But the Verdict is defective, because it does not find that it was USUALLY so done *before the 1st of Eliz.*" And on Account of the Incertainty, there was a *Venire de novo*: Otherwise, Judgment would have been given *for the Defendant*. So that You see, Finding the Office to be *necessary*, was *totally immaterial*.

In the Case of *Jones v. Beau*, in B. R. 3 W. & M. 1691, reported in 4 Mod. 16. The Issue directed out of Chancery was, "Whether the Office of Chancellor of *Landaff*, had been *usually* granted to *Two*, before the 1st of *Eliz.*" And the Jury finding "*that it bad*;" the Court held the Grant of the Office to *Two* to be Good. And no Man alive will say, "that it was *necessary* that the Office of a Bishop's Chancellor should be granted to *Two*."

The Office in question in *this* Cause, is found "*never* to have been more useful or necessary than it is *now*:" And yet *All* the Bishops of *Winchester*, from the 1st of *Eliz.* have thought the Grants of it valid; and Every succeeding Bishop has submitted to the Grant made by his Predecessor; And † the greatest Men of the Kingdom, or the nearest Relations to the Bishops, have successively held the Office. The *present* Bishop thought this Grant good, for *Eleven Years*; but has conceived a Doubt, from the Mis-application and Repetition of inconclusive and contradictory Arguments about the Office being *necessary*, which are to be found in the Reports of the Cases I have mentioned, before the 27th of C. 2d.

† Sir John's Grant was — "To hold in tam amplo modo, as Richard Earl of Portland, Thomas Cary, George Duke of Buckingham, Charles Earl of Nottingham, Thomas Duke of Norfolk, Philip Earl of Pembroke and Montgomery, James Duke of Ormond, or Henry Earl of Clarendon had holden."

Whereas we are All unanimously of Opinion, That an Office and Fee, which EXISTED BEFORE THE FIRST OF ELIZ. is not within the Statute; but may be granted *since*, precisely in the *same Manner*, in which it was granted *before*: And that the *Utility*, or *Necessity* of such an Office, is no more material, *since* the 1st of *Eliz.* than it was *before*. And this Opinion We think agreeable to the *Words* and *Intent* of the Act, and every *Precedent* since the Statute.

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* And in this Opinion, my Brother * *Wilmot* concurs with Us And * P. 226.
therefore there must be

JUDGMENT for the PLAINTIFF.

* V. ante.
219, 221.

Which Judgment was ordered, at Mr. *Norton's* Request, to be entered *as of the Term* in which the *Postea* was returnable: Because ^{† V. ante.} Sir *John Trelawney* was † dead, between that Time and the present ^{221.} Time of pronouncing the Judgment.

Goss *vers.* Nelson.

Saturday, 5th
February
1757.

MR. *Gould*, *pro Quer'*, shewed Cause why the Judgment obtained by the Plaintiff against the Defendant in an Action upon a promissory Note should not be arrested: The Note having been objected to, as contingent, uncertain, and not negotiable within the Act of 3, 4 *Ann.* Mr. *Gould's* Answer was that the Sum payable by this Note, is *Debitum in PRÆSENTI*; though *Solvendum in futuro*.

The Question depended entirely upon the Validity of this Note: Which was a promissory Note given to an Infant, ‡ payable ^{† V. post.—} “WHEN *He* (the Infant) *shall come* OF AGE; and SPECIFYING ^{Roberts v. Peake; a like Point, (viz. payable on the Death of G. H.)} the TIME when THAT was to be, *viz.* 12th June 1750. The Defendant's Counsel had moved to arrest the Judgment, for that this was not (as they alledged) a good Note, within 3, 4 *Ann. c. 9.* § 1. for giving like Remedy, upon promissory Notes, as upon Bills of Exchange.

In answer to which, Mr. *Gould* now cited 2 *Strange* 1217, the Case of *Cooke v. Colehan*: Where a Note, “To pay in 6 Weeks after the Defendant's Father's Death,” was holden a good Note.

Mr. *Caldecot contra pro Def'*: Here are, in this Declaration, 2 Counts on Notes of Hand indeed: But the Notes set forth in the Declaration, are not Notes for the *Benefit of Trade*; Nor is the Money made CERTAINLY payable. The Note was given to the Plaintiff, 13 YEARS before the Time when he was to come of Age; And it was not at all certain that he *would live* to attain that Age.

He cited 2 *Strange* 1151. The Case of *Beardsley v. Baldwyn*: Where a Note “to pay within so many Days after the Defendant should marry,” was held not to be a negotiable Note within the Statute.

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Hilary Term 30 Geo. 2.

* P. 227. * The Case of *Cooke v. Coleham* (cited by Mr. Gould) 2 *Strange* 1251. was payable Six Weeks after a *Death*: Which was a certain Event.

In order to have the Effect of a promissory Note within this Statute, it ought to be a *Cash-Note*, and payable at ALL Events.

No Note is negotiable, which is not for the Payment of Money absolutely. 1 *Strange* 629. *Morris v. Lee*. That was a Note promising "to be accountable to the Plaintiff or Order for 100*l.* Value received."—And held good. But a "*Quære tamen*" is added by Sir John *Strange*. All Notes payable on Contingencies are bad, within this Act: And this is a Contingency, "Whether he may arrive at the Age of 21; OR not."

Lord *Mansfield*—It would have been clearly good, if it had been made payable on the 12th of June 1750; (that is to say, on a Day certain;) without mentioning the Plaintiff's being then to come of Age: And surely it is not the less certain, for adding that Circumstance.

Legacies are of a different Nature: And they are determined by different Rules. They are Directions to the Executor, to pay: And in Legacies there is a known Distinction between the Time being annexed to the Substance of the Gift, or to the Payment. If complete Words of Gift direct the Executor to pay; the other Words only fix the TIME of such Payment: And then the Legacy vests, and is transmissible, though the Legatee should die before the Day of Payment: As a Legacy given, "to be paid at 21." But if the Time is annexed to the Substance of the Gift, as a Legacy "if" or "when" he shall attain 21; it will not vest before that Contingency happens.

But here the Words of Engagement MAKE the Debt; And 'tis no Direction to another Person. The former part of the Note is a Promise to pay the Money: And the Rest is only fixing the particular TIME when it is to be paid. It is enough, if it be CERTAINLY and at all Events payable at that Time, Whether he lives till then, or dies in the Interim. Therefore it is a GOOD Note, within this Remedial Statute.

Indeed a Contingent Note, where it is uncertain "Whether the Money shall ever become payable at all, or not," is another Case: SUCH a Note is not within the Statute.

Mr. Just. *Denison* concurred.

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* For here is *no Condition* or UNCERTAINTY: But it is *to be paid* * P. 228. *certainly, and at all Events; only the TIME of Payment is postponed.*

And the Case of *Cooke v. Colehan* was the Opinion of the whole Court.

He also cited *Boraston's Case*, 3 Co. Rep. 19, [Which proves "that where the Words refer to what *must necessarily* happen, 'tis "no Contingency, but a Remainder *executed*." V. *Equity Cases Abridged*, fo. 190. pl. 16. S. C.]

Mr. Just. Foster concurred.

A Legacy may be given upon *any Terms*.

But upon a promissory Note, the *Time* of Payment is only for the Benefit of the *Debtor*. Here, the Time of Payment is CERTAINLY *fixed*: And the particular Day specified for Payment of the Money, being mentioned to be the Day *on which the Infant is to come of Age*, makes no Difference from what it would have been, if that Circumstance had been omitted.

And They *All* agreed That this was *Debitum in presenti*, though *Solvendum in futuro*.

Per Cur' unanimously RULE DISCHARGED:
And the *Poslea* ordered to be delivered to the PLAINTIFF.

Goodtitle, ex dimiss. Hayward, *vers.* Whitby.

(Mr. Just. Foster absent.)

Tuesday, 8th
February
1737.

THIS was a Case from *Lancaster Assizes*, upon an Ejectment.

R. P. being seized &c, devised All his Messuages, Lands, Tenements, and Hereditaments whatsoever and wheresoever situate, to the Reverend Mr. *Thomas Hayward* and *John Bates* and the Survivor of them and the *Heirs* of such Survivor; "In Trust, that they and the "Survivor of them, his *Heirs* and Assigns should lay out employ "and bestow the Rents and Profits of the devised Premises, for the "Maintenance, Education, Bringing up and putting forth into the "World, of *Thomas* and *John Hayward*, Sons of the Testator's Sister *Elizabeth Hayward*, DURING their MINORITIES: And WHEN "and AS they should respectively ATTAIN their Ages of 21, Then to "the

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* P. 229. “ * the Use and Behoof of the said Sons of his Sister *Hayward*, the said “ *Thomas Hayward* and *John Hayward*, and their Heirs, equally.” And the Testator made the said two Trustees, the Reverend *Thomas Hayward* and *John Bates* his Executors.

It is stated that *Thomas Whitby*, the Defendant, is the Testator's Heir at Law.—

That *Thomas* and *John Hayward* are the Testator's Sister's Sons.

Thomas Hayward the Elder of the Testator's said two Nephews died under the Age of 21, and without Issue.

Upon his Death, his Brother *John* being then under Age, *Thomas Whitby* the Testator's Heir at Law, was let into the MOIETY of the DECEASED Nephew, *Thomas Hayward*, by the Trustees.

John, the surviving Brother brings the Ejectment, being now come of Age; and claiming the *Moiety of his deceased Brother*, as well as his own proper *Moiety*.

Question— “ Whether this *Moiety of Thomas* the deceased Brother, belongs to *John Hayward*, either as Heir to his Brother, or “ as surviving Joint-tenant; Or whether it belongs to *Thomas Whit-* “ *by*, as Heir at Law of the Testator, AS an undevised Estate.”

Mr. *Perrott* for the Plaintiff, (*viz.* for *John Hayward*, the surviving Nephew of the Testator.)

This Point is settled by many Resolutions.

1st. This is only a *Chattel-Interest* in the Trustees, (*though* given to them and *their Heirs* :) Because it is to last ONLY DURING THE MINORITIES of his NEPHEWS.

The Question is, “ Whether the Remainder VESTED in *Thomas* “ and *John Hayward* ;” Or “ Whether it remained in CONTIN- “ GENCY, till their respective Coming of Age.”

All that the Testator had in View, in this Trust, was to provide for the Care of his Nephews DURING their MINORITIES: And He only meant that the Time of their Coming of Age, should determine the TIME when they should be capable of Acting for themselves; NOT to make it CONTINGENT till they should come to 21. For at that rate, if they had married, and died under 21, THEIR CHILDREN could NOT have taken: Which the Testator, most undoubtedly, could never mean.

Boraston's

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* *Boraston's Case*, 3 Co. 21. was held a *vested* Remainder. * P. 230.

The Case of *Taylor v. Biddal*, 2 Mod. 289. is in Point.

The Case of *Edwards v. Hammond*, 3 Lev. 132. (Where the Estate's being contingent or not, depended on it's being a Condition precedent or subsequent,) was only held a Condition subsequent, and a *present* Devise to the Eldest Son.

Equity Cases abridged, H. 1713. fo. 195. pl. 4. The Case of *Mansfield v. Dugard*, is almost the same with the present Case.

So here, the Estate *vested immediately* in the two Nephews, upon the Death of the Testator; And therefore, upon the Death of *Thomas*, his Brother *John* is intitled to this Moiety; either as Heir at Law to Him, or as Survivor.

Mr. *Norton*, pro Def' *Thomas Whitby*, the Testator's Heir at Law.

The Will is, in Substance, no more than this—

The Testator gives to *A.* and *B.* and the Survivor of them and the Heirs of such Survivor, All his Messuages, Lands, Tenements, &c, IN TRUST that they shall dispose of the Rents and Profits of the devised Premises for the Maintenance, Education, Bringing up, and putting forth into the World, of his two Nephews (his Sister's Sons) *Thomas* and *John Hayward*, during their Minorities: And WHEN and AS they should respectively attain to 21; then to the Use and Behoof of them the said *Thomas* and *John Hayward* his two Nephews, and their Heirs, equally.

The Cases on this Head appear indeed *inconsistent* and *repugnant*: But the *true Method of solving* them is, to attend to the INTENTION of the Testator.

Now here The Testator *intended* his Nephews a *Fee*, IF they should *live* to make use of it; IF *not*, then *only* a *Provision* during their *Minority*.

And it is a Rule, “that the Heir at Law shall NOT *be disinherited* by *Uncertain Words* of a Devise.”

Here, NOTHING VESTED in either of the two Nephews, during their *Minorities*.

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* P. 231. * IF *the Testator had intended* a Benefit of Survivorship, to his two Nephews, He *knew how* to do it; as appears by *another Part* of his Will.

The two Nephews were not Each of them *intitled to a Moiety* of the *Profits during their Minority*: For they were *only* to be *maintained at the DISCRETION of the Executors*.

The Question is, "Whether this be, or be not, a *Condition PRECEDENT*; or an Estate depending upon a future Event that makes "it uncertain whether it shall ever take Effect."

Sheppard's Touchstone of Common Assurances, 117. defines a Condition precedent, to be "Where the Condition must be fulfilled, "ere the Estate can take Effect."

A Gift to *A*. "IF he comes from *Rome*," does not vest *till* He comes from *Rome*.

Just so, a Devise to *A*. IF he comes *of Age*; cannot vest *till* he comes of Age.

And he was not to have the Fee, *till* then.

In Gifts of *personal* Estate or Legacies, it is the same. For if the Time is annexed to the *Legacy* itself, and not to the Payment of it, then, if the Legatee dies before the Time of Payment, it is a lapsed Legacy: But if annexed to the *Payment*, then 'tis not. 1 *Lev*.

* V. ante 226. 167. *.
S. P. accord.

2 *Salk*. 415. Pl. 2. The Case of *Smell contra Dee*, 6 *Ann*. in Chancery. 2 *Vern*. 349.

As to the Executors taking only a *CHATTEL-Interest*; The being *defeasible* does not make it the less a *Fee*.

In the Case of *Gardner v. Sheldon* [*Vaughan* 259.] it is so laid down by *Ld. Vaughan*.

This is a Fee to the Trustees and *their Heirs*; though *liable indeed to a Contingency*. 'Tis the Word "*Heirs*," that makes it a Fee. *Littleton* § 1.

If so, then it cannot be a vested Remainder; but must be an *EXECUTORY Devise*, a *mere contingent Interest*. 10 *Co*. 85. *Leonard Loveis's Case*.

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* As to Mr. Perrott's Cases—

* P. 232.

Boraston's Case, 3 Co. 23. is not at all applicable to the present Case: And it was there *necessary*, towards forwarding the *Intention of the Testator*, that it *should be* a *vested Interest*. And that was an *express Devise of a Chattel*: So that the *Fee vested immediately*. But here are *no such Circumstances*, in *this Case*.

As to the Case of *Taylor v. Biddal*, 2 Mod. 289. There also was an *express Devise of a Chattel*, to *Elizabeth Wharton*; And the Fee descending to Her, *would have MERGED the Term*, *contrary to the Intention and Words of the Testator*.

As to the Case of *Edwards v. Hammond*, 3 Lev. 132. It is no more applicable to the present Case, than the other two are. That was a Condition *subsequent*.

But *here* are *no Words* to shew the *Intention* of the Testator to have been, “that if either of his Nephews should die, his Heir at Law should not inherit.”

And here it is stated that the Testator's Heir at Law was let into and held this Moiety by *Consent of all the Parties*, TILL this *John* came of Age. [V. Ante 229.]

As to the Case of *Mansfield v. Dugard*, It is distinguishable from the present Case.

Mr. Perrott, was going to reply—But Lord Mansfield stopt him, and said it was unnecessary.

LORD MANSFIELD—

The Case is no more than this. R. P. being seised in Fee, makes his Will to the following Effect—“I give and devise All my Messuages Lands Tenements and Hereditaments &c. unto the Reverend *Thomas Hayward* and *John Bates* and the Survivor of them, and to the Heirs of such Survivor, In TRUST to and for the Benefit of my Nephews *Thomas* and *John Hayward*; That is to say, upon Trust and Confidence That the said *Thomas Hayward* and *John Bates* and the Survivor of them, his Heirs and Assigns, shall lay out and employ the Rents and Profits of the said Premises for the *Maintenance, Education, Bringing up and Putting out* in the World, of the said *Thomas* and *John Hayward*, (the Testator's two Nephews,) DURING their MINORITIES: And WHEN and AS they shall attain their respective Ages of 21, My Will and Desire is, that the same Premises shall be and remain to them the said *Thomas Hayward* and *John Hayward*, and their Heirs, equally.” And he makes the same T. H. and J. B. his Executors.

It

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* P. 233. * It is stated, that the Defendant *Whitby* is the Testator's Heir at Law : But the Case does not state *how*, and in what Course of Consanguinity, *Thomas Whitby* is Heir at Law. 'Tis probable that He is *not* of the *Male Line* ; because his Name is *Whitby*.

The Testator died. *T. H.* and *J. B.* the two Trustees, entered into Possession. Then *Thomas Hayward*, one of the two Nephews and Devisees died, under Age, and without Issue. Then, the Trustees let the now Defendant, the Testator's Heir at Law, into Possession of his Moiety. But it is not material What *they* did among *themselves* : That will not affect the *Right* of the Plaintiff.

The Question is, " Whether the Estate *vested* immediately in " the two Nephews, upon the Death of the Testator ; Or *remain-* " *ed in Contingency*, till their respective Coming of Age : " And consequently, " Whether this Moiety belongs to *John Hayward*, " upon the Death of his Brother *Thomas*, *either* as his Heir at Law, " or as Survivor ; or whether it descends to the Heir at Law of the " Testator, as being *undevisee*."

In the Construction of Wills, adjudged Cases may very properly be argued from ; if they establish General Rules of Construction, to find out the *Intention of the Testator* : Which Intention ought to *prevail*, if *agreeable* to the Rules of Law.

Here it is agreed that a *Fee* is *devisee* to the Nephews : but it is made a Question, " Whether it be a Fee depending upon a *prece-* " *dent Contingency* ; or, an *immediate Fee*."

He said He would lay down a Rule or two of Construction, previously to giving his particular Opinion on this Case.

1st. Wherever the *whole* Property is *devisee*, with a particular Interest given *out of it*, it operates by way of *Exception* out of the absolute Property.

This Rule is laid down in *Matthew Manning's Case*, 8 Co. 95. *b.*

2d. Where an *absolute* Property is given ; And a particular Interest given, in the *mean time*, as " UNTIL the Devisee shall come " of Age &c ; And *when* he shall come of Age &c, then to Him " &c : " The Rule is, that that shall *not* operate as a Condition *pre-* " *cedent* ; but as a Description of the Time when the Remainder-Man is to take *in Possession*.

And to this Purpose is *Boraston's Case*, 3 Co. 21. *a. b.* Where this Doctrine is fully laid down and explained.

And

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* And this is sufficient to answer the Intention of the Testator : * P. 234.
the Devisee *does not want it in the mean Time.*

The Case of *Mansfield v. Dugard*,—in the *Abridgment of Equity Cases* 195. pl. 4. is also very strong, to prove the general Rule.

Here, upon the *Reason* of the Thing, the *Infant* is the *Object* of the Testator's Bounty : And the Testator does not mean to deprive him of it, in *any Event*. Now suppose that this Object of the Testator's Bounty *marries, and dies before his Age of 21 leaving CHILDREN ; could the Testator intend in such an Event, to disinherit Him ?* Certainly, He could not ? And as to the Testator's Heir at Law, *His Heir at Law* is only to take what the Testator has not devised away from Him.

But in the present Case, the Testator takes no Notice of this *Thomas Whitby*, who is indeed stated to be (but it doth not appear *how*) his Heir at Law. And He does not except any Thing out of the Interest he has given to his Nephews : He only makes a Trust, to be executed for *THEIR Benefit* ; And devises *nothing* for the Benefit of the *Trustees*, who were *also* his Executors. And this is *only a CHATTEL-Interest, which CAN NOT last 21 Years.*

On the Rule in *Matthew Manning's Case*, here is (at the utmost) only an *Exception*, by this Devise to the Trustees, *out of* the absolute Property given to his Nephews.

'Tis so plain upon the true Intent and Meaning of this Will, that it is a Shame to cite Cases upon it. But yet I remember an apposite Case, in *H. 17 G. in Canc. Tomkins v. Tomkins*, where the Devise was " to his Brother in Trust for his eldest Son *B. till he* " should attain 21 Years ; and if he should die before 21, then a " Devise over." The Court held the Age of 21 to be no Limitation of *B's INTEREST* ; but only a Limitation of the *Trust*, during his Minority ; And that *B.* took the whole by Implication.

So here, the *Property* is *absolutely given* : And the Limitation is only of the *Trust*.

Therefore upon the whole, He held the present Case to be

An *immediate Gift* to the two Nephews ; with a Trust to be executed for their Benefit, during their Minority.

Per Cur. Let the *Postea* be
delivered to the Plaintiff.

O o o

Master,

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* P. 235. * Master, &c, of the Vintners Company *vers.* Pasfley.

THIS was an Action of Debt brought upon a By-Law of this Company.

The Declaration (after a proper Introduction) set forth the By-Law, which was made on 24th *April* 1656, intituled “ An Ordinance of Election of Men into the Livery of the Corporation or Mistry of Vintners of the City of *London*”: Whereby it was ordained and established, That the Master and Wardens of the Corporation or Mistry of Vintners of the City of *London*, for the Time being, should have a decent Livery, comely for themselves, and meet to attend upon the Lord Mayor and his Brethren the Aldermen of the said City from Time to Time and at all Times, as Need should require ; and upon the said Master and Wardens, at all such Time or Times thereafter, and in such Gowns and Liveries, as they should be lawfully warned and summoned to come and be in, upon any necessary Occasions concerning the Credit and Worship of the said Company ; And also that once in every Year, or oftner if Occasion should serve, the said Master Wardens and Assistants, or the Major Part of them which should be then present at a Court of Assistants for the Time being, to be holden for the said Mistry, *should and might* ELECT *and choose* into the LIVERY or CLOTHING of the said Corporation or Mistry, SUCH AND SO MANY of the Yeomanry of the said Mistry, as *should seem most meet and convenient* unto them ; And that EVERY SUCH PERSON *of the said Yeomanry so chosen into the said Livery* as aforesaid, *should* AT or BEFORE his Admission into the said Livery, PAY to the said Master, Wardens and Freemen and Commonalty of the Mistry of Vintners of the City of *London*, to their Use, the Sum of 3 *l.* 13 *s.* 4 *d.* of lawful Money of *England*. And then and there, at the same Assembly, the said Master, &c, did make another By-Law, That Every Person and Persons of the said Corporation, *which at any Time thereafter should be* by the said Master Wardens, &c, for the Time being, at any Court, &c, ELECTED OR CHOSEN into the Livery of the said Mistry ; and *should not, upon Notice* given to Him or them in that Behalf, by the Clerk or Beadle, ACCEPT of the same ; or, upon Acceptance thereof, should, before his Admission into the said Livery, REFUSE to PAY to the said Master, &c, the Sum of 3 *l.* 13 *s.* 4 *d.* that then every particular so refusing to accept, &c, or to pay as aforesaid, *should* FORFEIT, &c, to the said Master, &c, the Sum of 25 *l.* to be recovered by Action of Debt, Bill, Plaint, or Information, to be brought in any Court of Record within the Commonwealth of *England*, by the said Master, &c.

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* Then the Declaration avers both the said By-Laws to be reasonable, &c. ; And also, that at the Time of the making them, and ever since, All the Freemen of the said Mistry, before their Admission to the Livery, were known by the Name of the Yeoman-dry ; And that the Defendant was a fit and able and proper Person to be elected into the Livery and Clothing of the said Company. Then it sets forth his Election upon the Livery ; And that He refused, &c. * P. 236.

To this Declaration—

The first Plea was “*Nil debet.*” And there was also, by Leave, a 2d Plea, That there are 12 *greater* Livery-Companies, in *London*, and other inferior Companies ; And that an Order was made at a Court holden before the Lord Mayor and Aldermen &c, on &c, at &c ; At which Court it was enacted &c, “ And that no Person should “ take upon himself the Livery of any Company being *one of the* “ *said* 12 Companies, &c, Unless he should have an Estate of “ 1000 *l.* &c.” And the Plea avers, That this *was One of the* 12 Companies ; And that he had *not* an Estate of 1000 *l.* &c. And therefore he says, that he was *not duly elected* upon the said Livery of this Company of Vintners.

The Plaintiffs demur to this 2d Plea : And the Defendant joins in Demurrer.

Mr. *Williams pro Quer.* made three Objections to the Plea.

1st Objection—That it is not set out *by what Authority* the Court which made this Order, was holden. *Clift.* 186, 196.

2d Objection. The Court is *uncertain* : For *many* Courts are holden before the Mayor and Aldermen ; And *Non constat*, which of them this is.

3dly *Non constat*, *what Authority* the Court of the Lord Mayor and Aldermen had to make this Order.

Mr. Serjeant *Martin pro. Def.* said—

It was not known, *at the Time of the Plea*, nor can *now* be known, *WHAT Authority* the Court of Lord Mayor and Aldermen had to make this Order : Therefore He gave up the Plea.

But

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* P. 237. * But he objected to the Declaration, in two Respects.

1st. The By-Laws are bad.

2d. The Defendant was *not duly summoned* to attend at the Court of Assistants, to take upon him the Livery.

First—The By-Laws are *arbitrary, illegal, oppressive, and not warranted* by Custom or Charter.

They are, “That the Company may elect *such* of the Yeoman-dry of their Members as should *seem most meet and convenient to them*, upon the Livery of their Company;” And “that every Person so elected, who should refuse &c, shall forfeit &c; And *EVERY Person so elected*, shall accept the same, and shall upon or before Admission, pay 31 l. 13 s. 4d. for an Admission Fee, on Forfeiture of 25 l.” (which Penalty of 25 l. is made payable absolutely and in all Events.)

Now the Livery-Men ought to be *Persons of Substance, capable* of being at the Expence of serving or paying the Fine.

And the Averment “That he was a fit and able and proper Person,” goes only to the just *Execution* of the By-Law; But will not make the By-Law *itself* good, which is in itself void.

3 Lev. 293. Mayor &c, of Oxford v. *Wildgoose*: [in Point, as to this.]

The Right “to have a Livery” must be founded either on Charter or Custom.

Pasch. 30 G. 2. Innholders Company v. Gledhill, B. R.—was so determined; And that the Court can’t presume it: And the want of shewing this, was holden to be such a Fault in the Declaration, as might be taken Advantage of upon General Demurrer.

In *Lilly’s Entries* there is a Precedent of such a Pleading upon such a By-Law.

On 27 July 1697. The Mayor and Aldermen made an Order (set forth in the Pleadings,) which shews the Opinion of that Court upon this Head of *Sufficiency* of the Persons elected.

In *Raym. 446. Taverner’s Case 33 C. 2.* (which he cited for the Sake of the Return,) This very Company made it Part of their Return to the Mandamus, “That every Livery-Man of this very Company
“ was

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“ * was used and ought to be *de bono Statu et Substantia*,” &c. [But * P. 238. N. B. the Fine of 31 *l.* 13 *s.* 4 *d.* was there allowed to be good.]

Comberb. 221. The Case of the Stationers Company v. *Salisbury*: (which was cited, as to the 1st Objection of it, and applied to the 1st Objection here:) Also the 2d Exception there, answers (as the Serjeant observed) to the 2d Objection here. [But that Case was not determined.]

2d. Objection to the Declaration—*Non constat* that He was *summoned* to attend at the Court of Assistants, to take upon him the Livery.

The Declaration shews, that the Master and One Warden may appoint a Court *whenever* they please: So that the Time of holding this Court, is *uncertain*. And they only shew that He was summoned to attend at the *next* Court, *generally*; without specifying *when it was to be holden*.

Mr. *Williams* in Reply.

1st. These By-Laws are now of above 100 Years standing: And they have been holden good, notwithstanding all Objections. Vide *Raym.* 446. *Taverner's Case*: [Where the Return of them was allowed.] And they ought to receive a favourable Construction.

If they choose a Person unfit, it may be taken Advantage of in Pleading, or upon Evidence.

City of London v. Vanacker, Carthew, 480, 483. A Power “to elect such Persons as should *seem* to them to be fit and able”—gives them a Discretion. 5 *Co.* 100. *a. Rooke's Case*.

This is a discretionary Power; and is confined to such as are fit and able; though it must be legally executed.

It is objected also, that the Penalty of 25 *l.* is made payable *absolutely*: Whereas it ought to be, *unless* he has a reasonable Excuse.

But this is implied.

And if he *has* a reasonable Excuse he may plead *Nil debet*.

Carthew 483. *City of London, v. Vanacker*: [in Point.] 1 *Lutw.* 402. By-Law of the City of *Canterbury*: Where *Non debet* was pleaded. (v. fo. 405.)

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* P. 239. * In Answer to the 2d Objection—

As to the *Time* of holding the Court, the Objection is only to the *Form* of the Declaration. But

It is averred “That Notice was DULY given Him of his Election;” And “That Notice was DULY given Him, to attend at the *next* Court of Assistants.”

Besides, He AS a MEMBER of the Company, was OBLIGED to TAKE Notice of the *Time* of holding their Courts.

As to 3 Lev. 293. The By-Law there does not even *confine* it to the *Inhabitants* of the City: But *this is confined* to the Members of the Company. [Still, This is no Answer to the material Objection.]

As to Comberb. 221. It was not determined. [No more it was.]

Lord Mansfield—

The Plea is *admitted* to be bad.

The Objections are to the By-Law: Which has been of 100 Years standing; and, several Times, judicially before the Court; and yet this Objection has never been hit upon.

However, One Answer strikes me: Which is “That NIL DEBET *may be pleaded*, if the Party was *really* unfit.” *Cartbew* 483. *Vanacker’s Case*, and 1 *Lutw.* 402. 405. Major, &c, *de Cambridge v. Herring*—are Proofs of this.—By the former, it appears that it may be given in Evidence, upon *Nil debet* pleaded: And in the latter, it was actually pleaded; and Issue taken upon it. And this equally holds, as to *any* reasonable Excuse. And We *will not intend* him to have been an improper Person.

Being a Livery-Man of the Company, He *ought to know* when the next Court is: And therefore *this* Objection has not much Weight.

Mr. Just. Denison.

The By Law gives Power “to elect such and *so many* out of the “Yeomandry, upon the Livery, as shall seem to them most meet “and convenient.” The main Design seems to relate to the *Number*. As to the *Ability*—By-Laws ought to have a *reasonable* Construction: We ought not to construe them so strictly, as to take them to be void, if *every particular* Reason of making them, does not *appear*.

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* Now here, it is objected "that the Person elected MAY be a * P. 240.
" Beggar."

But We can never intend that they would choose Persons NOT meet and convenient.

And if this be done, "Nil debet" will bring that Question before the Court.

And You cannot, upon *this Record*, take in the Order of the Court of Lord Mayor and Alderman; because THAT *Plea* is given up.

And the Notice shall be intended to be regular.

This is an Ancient By-Law; And Nothing unreafoable appears upon the *Face* of it.

Per cur. (viz. Lord Mansfield and Mr. Justice Denison,
the Other two Judges being absent.)
JUDGMENT for the PLAINTIFF.

Wilson, Clerk, *vers.* Greaves.

MR. Serjeant *Hewitt* shewed cause against a Prohibition, which Mr. Serjeant *Poole* had moved for (on the 6th of July last) to be directed to the Arch-Deacon of *Nottingham*, to stay his Proceeding in a Suit against Mr. *Wilson*, (Parson of *Newark*,) for *brawling* in the Church, and also for *smiting* in the Church: But he prayed the Prohibition, only as to the latter Charge, the *smiting* in the Church. [*V. 5, 6 E. 6. c. 4. § 2*: Which Act contains 3 distinct Clauses, levelled against 3 distinct Offences committed in Churches and Church-Yards; viz. the 1st against quarrelling, chiding, or brawling, by Words only; the 2d against smiting, or laying violent Hands; the 3d against striking with a Weapon, or drawing One with Intent to strike.]

His Objection was, That as to *this* Offence of *smiting* in the Church, there ought to have been a *previous* CONVICTION at LAW; though the Statute says "That he shall *ipso facto* be deemed "excommunicate." In Proof of which, he cited *Cro. Eliz. 224. pl. 6. Dethick's Case*; Where He was *indicted*, upon this Statute of 5, 6 E. 6. for Striking in *St. Paul's Church-Yard*: Though he got off indeed, for want of being named *Garter*.

¹ *Ventr. 146. The Case of Dyer v. East*, is full in Point, "That
" the Striker in a Church-Yard does not stand *ipso facto* excommu-
" nicated,

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* P. 241. “ * nicated, UNTIL he be thereof convicted at Law, and this trans-
“ mitted to the Ordinary.”

And here having been no *previous Conviction* at Law, He prayed
a Prohibition *quoad the Smiting* : And obtained

A RULE to shew Cause.

Against which Rule, Mr. Serjeant *Hewitt* (on Monday 7th February 1757,) shewed Cause, as follows.

On 5, 6 E. 6. c. 4. there are 3 Sections, and three different Offences : And this Offence charged in the Libel, is not an Offence constituted so by this Act ; But was a Matter within the Jurisdiction of the Spiritual Court, *before that Act*, and *abstractedly from it*. They have, without Dispute, Jurisdiction as to the *Brawling*. And as to the second Branch, for *Smiting in the Church*, there needs not be a previous Conviction at Common Law : It is enough, if the Excommunication be in the *Spiritual Court*. To prove which, he cited *Hetley* 86. The Case of *Viner v. Eaton* : Cro. Jac. 462. The Case of *Large v. Alton*, pl. 7 : Cro. Eliz. 680. The Case of *Baker v. Brent and Robinson*. 1 Hawk. P. C. fo. 139. c. 63. § 27.

2 Ed. Raym. 850. The Case of *Wenmouth v. Collins*. The Court denied a Prohibition ; because this Offence was originally and before this Statute, conusable in the Ecclesiastical Court, *ratione loci* ; And that the Statute, though it provides a Penalty, does not alter the Jurisdiction.

Therefore, he concluded that notwithstanding *this* Objection, The Spiritual Court *have* Jurisdiction.

It was then adjourned to the next Day ; when it proceeded and was determined. Mr. Justice *Foster* and Mr. Justice *Wilmot* were Both absent.

Tuesday, 8th February 1757. Mr. Serjeant *Poole*—I cited 1 Ventr. 146. *Dyer v. East*, as a Case in Point, “ That there *must be* a previous Conviction by a “ Trial at Law ;” And “ that such Conviction must be *transmitted* “ to the Spiritual Court.”

Cro. Eliz. 224. *Detbick's Case* : Where there was an Indictment actually found and pleaded to.

As to My Brother *Hewitt's* Cases—

Hetley 86. *Viner* against *Eaton*, is a loose, incomplete Note ; and gives no Reason why the Prohibition was denied.

Cro.

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**Cro. Jac.* 462. *Large v. Alton* proves Nothing at all to the present Purpose : And it was for *brawling, only* ; In which Case, I agree that no Prohibition shall go. * P. 242.

Cro. Eliz. 680. is indeed in the Alternative, “ after Sentence, or “ due Trial and Conviction, and not before.” But that is only said by *Dodderige*, then at the Bar, in arguing for the Defendant.

Wenmouth v. Collins might be for a Prohibition *generally*. Indeed a Reason is given for denying the Prohibition ; *viz.* “ That the “ Spiritual Court originally had Jurisdiction to hold Plea of this “ Matter, before the Act.”

But I deny that they had such *Original* Jurisdiction : And the Act gives them *None*. This is a Force *Vi et Armis* ; An Assault and Beating : And the temporal Courts will prohibit them from proceeding upon it.

Bro. Prohibition pl. 14. and *Bro. Consultation* 6. are express, “ that “ Where a Man sues in the Spiritual Court ; And an Action at “ Common Law lies for the same Matter ; A Prohibition lies, And “ No Consultation shall be granted.” [These are Both the same Case ; *viz.* 22 *E.* 4. 20.]

Mr. *Taylor White* spoke on the same Side, for Mr. *Wilson*.

He even attempted to shew that a Prohibition would be reasonable as to the *Brawling* : For that the Fact stated could not come within the Notion of brawling ; And it was only speaking to a third Person, to turn *Greaves* out of the Church.

As to the *Striking* — The Spiritual Court had no Jurisdiction *before* the Statute ; And the Statute gives them *None* : They have only Power to *pronounce the Sentence* of Excommunication ; but *not* the Power of *judging*.

As to the Case of *Wenmouth v. Collins*, It is but a loose Note ; and *Holt* was absent ; and there might have been a Confession.

And there have been many Indictments, He said, on this Statute ; And *this* Method of Conviction was the *ancient* Method.

Lord *Mansfield*—

The Statute of 5, 6 *Ed.* 6. *c.* 4. has three Degrees of Offences, and three different Punishments.

Q q q

And

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* P. 243. * And whatever Jurisdiction the Spiritual Court might claim *before* the Act, they are *now* proceeding *since* the Act : Therefore it is not very material how the Matter stood *before* the Act.

The Punishment is given, by this Act, to the Ecclesiastical Court : And the Punishment is such as can only be executed BY *the Ordinary*.

The Case stated with regard to the first Offence, is sufficiently a *Brawling*, within the Meaning of the Act.

The second Offence is SMITING *in the Church, or Church Yard*. Now this is indeed *still* an Offence at *Common Law* ; And He *may* be indicted for it : But, besides this, He may, by this Act, be *ipso Facto*, excommunicated. By whom ? By the Ordinary. Indeed the Ordinary *may* use a Conviction at Law, as a *Proof* of the Fact.

And the Case in *Raym.* [2 *Ld. Raym.* 850. *Wenmouth v. Collins*,] is a plain Proof that the Ecclesiastical Court may proceed upon the two first Clauses, and are not to be prohibited.

But then there is a third Offence and a third Punishment mentioned in the Act of 5, 6 *E. 6. c. 4* : Which has made all the Confusion. This Offence is maliciously striking with any Weapon, in any Church or Church-Yard, or drawing any Weapon there, with Intent to strike. For this 3d Offence, the Act inflicts a double Punishment ; One, Temporal ; the other, Spiritual : The Temporal Punishment is Loss of an Ear, or Marking in the Cheek, *after Conviction* ; the Spiritual is, “ And *besides*, Every such Person to be “ and stand *ipso facto* excommunicated as is aforesaid.”

Here, indeed, there must be a *previous* Conviction ; And a Transmision of the Sentence ; and a Declaration.

But on the second Clause, No *previous* Conviction is necessary : (though, *if* there is one, it may be used As a *Proof* of the Fact.)

This Libel is upon the *first* and *second* Clauses : NOT upon the *third*.

And the Proceedings of the two Courts being *diverso intuitu*, it is no Objection, to say, “ That a Man will, at this rate, be *twice* “ *punished* for the *same* Offence.”

This is *common*, in many Cases : For *We* proceed, to *punish* ; They to *amend*.

'Tis

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*'Tis clear, that upon the TWO FIRST *Clauses*, the Ecclesiastical * P. 244.
Court HAS a Jurisdiction.

The Cases upon Words do not apply to the present Case.

Mr. Just. *Denison* concurred.

Their Proceedings are *pro Salute Animæ*. Indeed if they proceed for *Damages*, this Court will prohibit them. And that was laid down by the Court, in the Case of *Large v. Alton*, in *Cro. Jac.* 462. where the Costs being given only *pro Expensis Litis*, the Court would not prohibit them: But they declared that they would have done otherwise, if it had been *pro damnis*.

And it is plain to me, that the Case in 1 *Ventr.* 146. *Dyer v. East*, was really a Determination upon the *third* Clause of the Act; and is a Mistake: I suppose the Words "*with a Weapon*," are left out, by Mistake. The Reporter was then a Young Man.

But however, this is the *only* Case to be met with, to this Purpose; And it must be a Mistake, either in the State of the Case, or in the Opinion: For on the *second* Clause, Surely, We can NOT prohibit them; because they are exactly within the *Words* of the Statute, "That if any Person or Persons shall smite or lay any violent Hands upon any other, either in any Church or Church-yard, they shall *ipso Facto* be deemed Excommunicate."

Per Cur', (*viz.* the only two Judges now present)
The RULE WAS DISCHARGED.

Woolley et al' *vers.* Cobbe et al' (Bail of Cobbe, a Wednesday,
Bankrupt.) 9th February
1757.

THE original Defendant became Bankrupt, pending the Action. Bail was *fixed* in July. The Bankrupt obtained his *Certificate*, in August following.

The Question was, "Whether the *Bail* should be *discharged*, "by this *Certificate*," (which was not obtained *till* AFTER they were *fixed* and the *Debt levied* upon them by *Fi. fa.* and the Money *actually in the Hands of the Sheriff*;) Or "Whether the Bail were become *absolutely liable*; and Consequently, the *Certificate* came too late to help them."

Lord

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* P. 245. * Lord *Mansfield* made a Distinction, And Mr. Just, *Denison* and Mr. Just. *Foster* agreed to it, "That if the Certificate is obtained " *before* the Bail are *fixed*, they shall be *discharged*: But if they are " *fixed*, before the Certificate is obtained, they *remain liable*."

V. post. Mich. 1757. 31 G. 2. B. R. Cockerill v. Owston S. P.
agreed to by the whole Court.

Rex *vers.* Gayer Esq.

MR. *Gould* and Mr. *Willes* shewed Cause against quashing an Order of Sessions, which (upon Appeal to them, by Mr. *Gayer*,) discharged an Order of two Justices appointing *James Gayer* Esq; and *Benjamin Copley* to be Overseers of the Parish of *Rockbear in Com. Devon*.

Mr. *Gayer* alone appealed from this order of Appointment; and the Sessions discharged it, as to the Appointment of Mr. *Gayer* only: [The Words of the Order are—"It appearing unto this " Court that &c, and also &c, and that &c; This Court doth " THEREFORE vacate and make void the said Warrant, as to the " said *J. Gayer*."] It appearing unto them, that he had some Years been, and was at the Time of the Nomination, and still at the Time of making the Sessions Order, an ACTING JUSTICE of Peace for the said County, residing within the said Parish of *Rockbear*, and a substantial Housekeeper there; And also a Lieutenant of *Marines in his Majesty's Service, on Half-Pay*; And that there are other sufficient substantial Householders within the said Parish, for the doing such office. The Court "THEREFORE vacated, and made " void the said Warrant, as to the said *James Gayer*."

Mr. *Norton* had, on 13th November 1756, moved to quash this Order of Sessions: For that *neither of these two Reasons* were sufficient to justify the Sessions in quashing the Order of two Justices, whereby Mr. *Gayer* was legally and regularly appointed One of the Overseers of the said Parish.

A RULE was thereupon granted, "to shew Cause."

On shewing Cause, The Counsel on both Sides went (at large) into a long Argument, "Whether the Reasons given were sufficient:" "Particularly, "Whether the Offices of Justice of Peace, and the "Office of Overseer, were compatible; and "Whether the Objection could be removed by appointing a Deputy-Overseer;" If it could,

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* could, then “Whether a Justice of Peace was *liable* to be appointed Overseer, in order to his executing the Office by Deputy.” * P. 246.

Lord *Mansfield* said, the *General Questions* concerning the *Incompatibility* of Offices, and the *Power of appointing Deputies*, are a large Field indeed: But the *present Question* seems to turn in a very narrow Compass.

The *Sessions*, upon an Appeal, have a Right to exercise the *same Latitude of Discretion*, in judging “Who are fit to be Nominated Overseers,” as the two Justices had. They have given their Opinion “That Mr. *Gayer* was *not a proper Person* to be appointed Overseer.” They are *not obliged* to give *any Reason* for their Opinion: because the Legislature has intrusted them, upon an Appeal, with the Power or Authority of appointing Overseers.

If they had given *no Reason*, their order had undoubtedly been good: We must have *presumed* that they acted upon *proper Grounds*.

It is true, that where the *whole Reason* is set out, and is *clearly wrong*, We may and ought to quash an Order *manifestly* made by Mistake, upon an erroneous Foundation.

But then the bad Reason given must appear to have been their *only Inducement*. If there may have been *other Grounds*, they should be presumed sufficient: And the Order ought not to be set aside, because *some* of their Reasons, unnecessarily given, appear to be bad.

There was *no Necessity* for appointing Mr. *Gayer*: The Sessions state “that there were other sufficient substantial Householders within the said Parish.” They might think Mr. *Gayer*, under *all* the Circumstances, improper *unnecessarily* to be appointed: His being an acting Justice of Peace residing within the Parish, and a Lieutenant of Marines, might be two Circumstances which weighed among *others*. But it don’t follow, neither is it said, that they looked upon both or either of these Reasons, as an *Exemption* from being appointed, or a *Disability* to serve the Office of Overseer; and that they vacated the Warrant of two Justices *as illegal* upon *that Account*.

The Execution of a Discretionary Power, where it is not necessary to give a Reason, ought to be supported; *unless* the *whole Reason* is set out, and *manifestly wrong*. Here, the *whole Reason* upon which the Sessions acted, *is not given*. They say there were Other Persons, qualified. Supposing Mr. *Gayer liable* to serve the Office, they might think Him *not so proper* as many Others. And there-

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fore

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* P. 247. * fore We are not obliged to say “ that the *whole* Reason they went “ upon, is bad;” allowing (for Argument) that there arose *no legal* Objection to the Appointment of Mr. *Gayer* : Which, I think, there is no Occasion now to examine.

Mr. Justice *Denison* concurred.

They were not *obliged* to give *any* Reason at all: And if it be *only an imperfect One*, We ought *not* to quash their Orders.

He added—I remember a Case, (*Rex v. Spalding*, I think it was,) Where the Justices held a Man settled in a Parish, by reason of an Apprenticeship; Not saying “ That He had *served* 40 Days in the “ Parish, under it:” Yet the Court would *not intend* that they did *wrong*.

We will *intend* EVERY *thing* in FAVOUR of the Justices, in their Orders.

Now here, the Reason *does not appear* to be a *wrong* Reason: It is enough, that *they judged* him an IMPROPER *Person to be Overseer*.

Mr. Just. *Foster* concurred.

Per Cur. unanimously

ORDER of SESSIONS confirmed:

ORDER of TWO JUSTICES quashed.

Thursday,
10th February
1757.

Rex vers. Inhabitants of Chidingfold.

See this CASE abridged in the TABLE; and at large in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 132. pa. 415.

* P. 248.

Saturday,
12th February
1757.

* *Plummer versus* Bentham.

THE Recorder of *London* (Sir *William Moreton*) came to the Bar, and CERTIFIED two *Customs* of that City, *ORE TENUS*.

Mr. *Williams* moved, (when Sir *William Moreton* was down at the Bar,) that the Recorder of *London* might return two Writs of *Certiorari*

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Certiorari directed to the Lord Mayor and Aldermen of *London*, to certify two of the Customs of their City.

And then Mr. *Williams* opened the Case, *viz.* That it was an Action of Trespass on the Case brought by the Plaintiff against the Defendant, for *obstructing his ancient Lights*, by a *new Erection or Building* which the Defendant had raised against them: To which, The Defendant had, (by Leave,) pleaded two Justifications, Both of them under the Custom of the City of *London*. One of them was, that there is an ancient Custom in the City of *London*, “ That
“ if any Person has a Messuage or House in the City of *London*, ad-
“ joining or contiguous to another MESSUAGE OR HOUSE or to the
“ Ancient Foundations of One in the said City, which former House
“ has *ancient Lights or Windows* fronting opposite to or over such
“ other adjoining or contiguous MESSUAGE OR HOUSE or ancient
“ Foundation of one; Such other Person, Owner of the LATTER Mes-
“ suage or House or ancient Foundation of One, may well and law-
“ fully exalt such his Messuage or House, or rebuild upon the ancient
“ Foundations of such his adjacent or contiguous MESSUAGE OR
“ HOUSE any new Messuage or House, to ANY HIGHTH that he shall
“ please, against and opposite to the said ancient Lights and Windows
“ of such first-mentioned neighbouring Messuage or House to which
“ his Messuage or House or ancient Foundations of a Messuage or
“ House are so contiguous or adjoining; and thereby darken and ob-
“ scure such ancient Lights and Windows of such first-mentioned
“ neighbouring House, having such ancient Lights and Windows:
“ Unless there has been some Writing Instrument or Record of an
“ Agreement or Restriction to the contrary.”

* On this Plea, Issue was joined: And a *Certiorari* issued, directed * P. 249.
to the Mayor and Aldermen of the City of *London*, to certify
“ Whether they have or have not such a Custom.”

The second Plea, Issue, and *Certiorari*, were the same with the first, only with this Difference or rather *Extension* of the Custom pleaded; *viz.* “ That the Owner of any ERECTION OR BUILDING
“ or the ancient Foundation of any ERECTION OR BUILDING,
“ might well and lawfully exalt such ERECTION OR BUILDING, or
“ erect and build thereon a new ERECTION OR BUILDING to any
“ Hight that he pleases &c;” and so on, as in the former Plea: Only that the former Plea confined the Claim of the Privilege, to *Messuages or Houses*; which this latter Plea extends to *all Erections or Buildings*.

Sir *William Moreton* Knt. Recorder of *London*, accordingly certi-
fied ORE TENUS, by Command of the Lord Mayor and Aldermen,
(after

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* See the first Case in Sir H. Calthrop's Reports (pret- tily reported and worth reading;) where the Question was very like the present, and the Determination agreeable to the Certificate as to this first Plea.

(after having recited the Pleadings and *Certiorari*;) "That there *
" is such a Custom as is alledged in the *former* Plea: But that there
" is no such Custom as is alledged in the *latter* Plea."

The Recorder then delivered in both the Writs of *Certiorari*, with *written Copies* of the respective Returns annexed; though He had delivered them *Ore tenus* at the Bar: (Which, he told Me, was usual.) The Returns were worded as follows; *viz.* The Execution of this Writ appears in a certain Certificate by Us the Mayor and Aldermen of the said City of *London*, made by the Recorder of the said City at the Day and Place within contained, according to the Custom of the said City, by Word of Mouth, as is within commanded.

The Answer of Marthe Dickinson Esq; the Mayor, and of the Aldermen of the said City.

We the said Mayor and Aldermen of the said City, by Sir *William Moreton* Knt. Recorder of the said City, by Word of Mouth of the said Recorder, according to the said Custom of the said City, Do, in Obedience to the said annexed Writ, humbly certify That there is now had, and from the Time whereof the Memory of Man is not to the contrary there hath been had and received such ancient and laudable Custom in the said City used and approved; to wit,
" That if any One hath a Messuage or House in the said City, near
" or contiguous and adjoining to *another ancient* MESSAGE OR
" HOUSE, or to the ancient *Foundation* of *another ancient* MESSU-
" AGE OR HOUSE in the said City, of *another Person his Neighbour*
* P. 250. " * there; And the Windows or Lights of *such Messuage or House*
" are looking fronting or situate towards upon over or against the
" said *other* ancient MESSAGE OR HOUSE or ancient *Foundation*
" of such other ancient MESSAGE OR HOUSE of such *other Per-*
" *son his Neighbour*, so being near adjacent contiguous or adjoining,
" *Although* such Messuage or House and the Lights and Windows
" thereof be or were *Ancient*, YET such *other Person his Neigh-*
" *bour*, being the Owner of such Other MESSAGE OR HOUSE or
" ancient *Foundations* so being near adjacent or adjoining, by and
" according to the Custom of the said City in the same City for all
" the Time aforesaid used and approved, *well and lawfully may*,
" might and hath used, at his Will and Pleasure, his *said other*
" MESSAGE OR HOUSE so being near adjacent or adjoining, by
" Building *to exalt or erect*; or, of new, upon the Ancient *Foun-*
" *dations* of such *other* MESSAGE OR HOUSE so being near adja-
" cent or adjoining *to build and erect a new Messuage or House* to
" SUCH HIGHTH AS THE SAID OWNER SHALL PLEASE, *against*
" and

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“ and *opposite* to the said *Lights and Windows* near or contiguous to
“ such OTHER MESSAGE OR HOUSE, and by Means thereof
“ TO OBSCURE AND DARKEN such Windows or Lights: Unless
“ there be or hath been some Writing Instrument or Record of an
“ Agreement or Restriction to the contrary thereof in that Behalf.”

The Return to the other Writ of *Certiorari* was in the same Form, and to the very same Effect as to the Custom certified by the former; and repeated the Return to the former *Certiorari in totidem verbis*, very nearly: But it went on further, with a *Negation* of the Existence of any such Custom as the Defendant had alledged in his *second* Justification. The Additional Part was as follows.

And that in the said City of *London* there is NOT now or ever was any such Custom, “ That if any One hath a Messuage or House in
“ the said City, near or contiguous and adjoining to an ERECTION
“ or BUILDING or to the ancient Foundations of an ERECTION or
“ BUILDING, in the said City, of another Person his Neighbour
“ there; And the Windows or Lights of such Messuage or House
“ are looking fronting or situate towards upon over or against such
“ ERECTION or BUILDING or the ancient Foundations of such
“ ERECTION or BUILDING of such other Person his Neighbour so
“ being near adjacent contiguous or adjoining: Although such Messuage or House and the Lights and Windows thereof be or were
“ ancient, Yet such other Person his Neighbour, being the Owner
“ of such ERECTION or BUILDING or ancient Foundations of such
“ ERECTION or BUILDING so being near adjacent or adjoining, by
“ and according to the Custom of the said City in the same City for
“ all the Time aforesaid used and approved, well and lawfully may * P. 251.
* might and hath used, at his Will and Pleasure, his said ERECTION or BUILDING so being adjacent or adjoining, by Building
“ to *exalt and erect*; or, of new, upon the ancient Foundations of
“ the said ERECTION or BUILDING so being near adjacent or adjoining to build and erect a *new Erection or Building*, to SUCH
“ HIGHTH as the Owner shall please, against and opposite to the said
“ Lights and Windows of such Messuage or House, and by means
“ thereof to obscure and darken such Windows or Lights.”

The COURT Ordered the *Certiorari* to be filed, and the Return RECORDED.

Note—Nothing of this kind has actually happened for many Years past, (not even since *H.* the sixth's Reign,) in *this* Court; (though it has in the Court of Chancery.) And a Consultation was had in the City, concerning the Sort of Gown which it was proper for the Recorder to put on, to make this *Ore-tenus* Return: In which Consultation, it was deter-

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mined

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mined that it ought to be the Purple Cloth Robe, faced with black Velvet; and not his Scarlet Gown, his Black Silk One, nor the common Bar-Gown.

See *Viner's Abridgment*; Title *Customs of London*, Letter P. *placita* 2 & 4. concerning this Manner of trying the Customs of *London*: and how to *surmise* "that they ought to be tried thus, "and not by the Country:" 'Tis in *Vol. 7. Page 246.* Note—*Without* such a *Surmise*, they shall be tried by the Country, as other *Issues in Fact* are.

Rex *vers.* Strong.

MR. Serjeant *Poole* shewed Cause against quashing an Indictment on 5 *Eliz. c. 4. sect. 31.* (for exercising a Trade, not having served an Apprenticeship therein,) found at the Sessions for the CITY of *Carlisle*.

Mr. *Norton* had (on 27th November 1756) moved to quash it, upon an Objection, "that the City-Sessions had no *jurisdiction*." And He had cited, in Proof of it, The Case of *Regina v. Taylor*, 2 *Ld. Raym.* 767. Where such an Indictment was quashed, "because the "BURROUGH Sessions had no *jurisdiction* to take such Indictments." He insisted that ONLY the *Quarter-Sessions* of the COUNTY have Jurisdiction. The Indictment in that Case of *Taylor*, was found at the Sessions for the *Corporation of Wells*; and moved hither by *Certiorari*.

* P. 252. * Lord *Mansfield*, at the Time of the original Motion, looked into the Act of 5 *Eliz. c. 4.* and said that this Act [§ 39.] expressly gives the Power to Mayors or other Head Officers of *Cities or Towns Corporate*, at THEIR Sessions.

And now, upon shewing Cause,

The COURT was unanimously of that Opinion.

The Case of the *Queen* against *Taylor* was in *Easter Term* 1702, 1 *Annæ*: And is contradicted by that of *Regina v. Franklyn*, in 2 *Ld. Raym.* 1038. which was determined in *Mich. 3 Ann.* 1704. though it is in 1 *Salk.* 370, by *Mistake*, put under *Mich. 3 Will. & Mar.*

Per Cur. RULE DISCHARGED.

MEMO-

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MEMORANDUM.

The COURT was not up till near an Hour after Midnight ; though many Rules were enlarged, and many long Motions adjourned over till next Term.

A S the Regulation made by the Court concerning VIEWS took it's Rise in *this* Term, it may be proper *here* to state every Thing relative to that Subject ; which, *at the Time of this Publication*, is a Practice fully settled.

The Granting of Rules for VIEWS in * *Civil* ^{N. B. 4, 5 Ann. c. 16.} Causes stands † now settled upon the following Foot. ^{§ 8. does not extend to Criminal Cases :}

GREAT INCONVENIENCE had arisen from the *Abuse* of Views and their being perverted into Means of DELAY, to the intolerable Hindrance of Justice. Some late Instances shewed the Mischief in a glaring Light : and the Example being once set, there was no Doubt it would be followed. ^{So that in them there can be no Rule for a View, without mutual Consent.}

* *After the 4 & 5 Ann. c. 16. sect. 8. Views were granted, upon Motion, of Course. And upon this Act and 3 G. 2. c. 25. sect. 14. a Notion prevailed " That Six of the first Twelve upon the Pannel " must view, and appear at the Trial : If they did not, there could " be no Trial, and the Cause must go off."* ^{† In 1765. * P. 253.}

Where *either* Party wished Delay or Vexation, He moved for a View. A thousand Accidents might prevent a View, or Six of the first Twelve from attending the View, or their attending the Trial. He who wished them not to attend, might by various Ways bring it about. Where a Defendant in Possession was well liked, and the Plaintiff a Stranger or unpopular, Gentlemen of themselves found Excuses ; Especially, if the View was troublesome and at a Distance. Causes in several Counties had at a great Expence been repeatedly carried down, and put off ; either because there was no View, or because Six of the first Twelve did not attend the View or did not attend the Trial. Though Twelve Viewers should appear at the Trial,

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Trial, yet according to the Notion which prevailed, if *Six of the first Twelve* upon the Pannel were not among them, the Cause could not be tried.

The Tendency of this Abuse, to Delay, vexatious Expence and the Obstruction of Justice, was so manifest, that the Court thought it their Duty to consider of a Remedy: And in *Michaelmas* Term 1757, and at other Times Lord *Mansfield* informed the Bar to the following Effect, “ That they had conferred together upon the “ ABUSE of Views, and considered of a Remedy in the Power of “ the Court.”

Before the 4 & 5 *Ann. c. 16. sect. 8.* there could be no View till after the Cause had been brought on to Trial. If the Court saw the Question involved in Obscurity which might be cleared up by a View, the Cause was put off, that the Jurors might have a View before it came on to be tried again. The Rule for a View proceeded upon the previous Opinion of the Court or Judge, at the Trial, “ that the Nature of the Question made a View not only “ proper, but necessary:” For the Judges at the Assizes were not to give way to the Delay and Expence of a View, unless they saw that the Cause could not be understood without one. However, it often happened in Fact, that upon the Desire of either Party, Causes were put off for want of a View, upon specious Allegations from the Nature of the Question, “ that a View was proper;” without going into the Proof, so as to be able to judge whether the Evidence might not be understood without it.

* P. 254. * This Circuitry occasioned Delay and Expence: To prevent which, the 4 & 5 *Ann. c. 16. sect. 8.* empowered the Courts at *Westminster* to grant a View in the first Instance, previous to the Trial.

As a View might be of Use, and in this Shape was attended with no Delay and but little Expence, it became the Practice to grant them of Course, upon the Motion of either Party.

The 3 *G. 2. c. 25. sect. 14.* provides “ that where a View shall be “ allowed, the Jurors who have had the View shall be first sworn, “ (or such of them as shall appear,) before any Drawing:” Which means, in Opposition to such other Jurors as are to be drawn by Ballot; and not to establish “ that Six at least of the first Twelve “ shall be sworn.”

Upon a strict Construction of these two Acts, in Practice, the Abuse which is now grown into an intolerable Grievance has arisen.

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Nothing can be plainer than the 4 & 5 Ann. c. 16. sect. 8. The Courts are *not bound* to grant a View of Course: The Act only says “ they may order it, where it shall appear to them that it will “ be *proper and necessary*.”

It is infinitely better that a Cause should be tried upon a View had by *any Twelve*, than by *Six* of the *first Twelve*; or by *any Six*; or by *fewer* than *Six*; or even without any View at all; than that the Trial should be *DELAYED from Year to Year*, perhaps for ever: It can never be *proper or necessary* to grant a View which is asked and used for so *unjust* a Purpose.

There have been Instances of great Causes put off for Years: And though even nine ten or eleven Viewers have attended, yet upon Objection “ that they were not *Six* of the *first Twelve*,” the Cause has been put off, and a View moved for, as of Course, again, by the Party who had availed Himself of so glaring a Chicane.

We are All clearly of Opinion, that the Act of Parliament meant a View should not be granted, *unless* the Court was *satisfied* that it was PROPER AND NECESSARY.

The *Abuse* to which they are now perverted makes this Caution our indispensable Duty: And therefore upon every Motion for a View, We will hear both Parties, and examine (upon all the Circumstances which shall be laid before Us on both Sides) into the *Propriety and Necessity* of the Motion; Unless the Party who applies will consent to and move it upon *Terms* which shall prevent an unfair Use being made of it, to the Prejudice of the other Side and the Obstruction of Justice.

* LORD MANSFIELD having made this Declaration, His Lord- * P. 255.
ship desired the Gentlemen of the Bar to think of it; and, if any Objections should occur, to mention them.

The Expedient proposed by the Court was universally approved.

The first Instance happened in *Hilary Term 1757*. in a great Cause between *Pierce* and the Earl of *Faulconberg* and Others; which was an Issue out of Chancery, often tried at *Durham* by Special Juries, and now ordered to be tried at Bar by a Special Jury from *Yorkshire*. (See the Rule at large, together with the *Addition* of the Consent-Part, *infra*, *pa.* 256, 257.)

Subsequent to this, was the Cause of the Earl of *Darlington* v. *George Bowes*, Esq; which was an Issue out of Chancery, and had been thrice carried down to be tried at *Durham* (where there are

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Affizes only once a Year) at a great Expence, and every time put off by the Defendant, upon objections on Account of the View. Once, nine Viewers appeared: but they were not Six of the first Twelve. Another Time, only four Viewers appeared at the Affizes. In 1757, a View was granted by mutual Consent, upon Terms: But by an Accident (of a Fall from his Horse) the Judge of Affize was prevented from trying it. The Defendant *Bowes* moved, in *Trinity* Term 1758, for a View; but refused to renew his former Consent, or to come into any Terms; insisting that by Law He was intitled to a View, of Course. The Plaintiff had likewise moved for a View; consenting to the Terms. Both Motions were adjourned to the last Day of the same *Trinity* Term 1758; When the Court, upon all the Circumstances, rejected the Defendant's Motion, unless he should consent (within a Week) to the Terms proposed. He would not consent. The Cause came on to be tried at *Durham*, without a View, before Mr. Baron *Smythe*. It happened, many of the Jurors had viewed upon some of the former Occasions. A Verdict was given, for the Plaintiff, to the Satisfaction of the Judge. The Defendant moved the Court of Chancery for a new Trial; because He had been refused a View; and because it might be fit to have another Trial, before his Inheritance was bound. Mr. Baron *Smythe* certified "that he was satisfied "with the Verdict"; and also, "that a View was totally unnecessary, there being no Dispute concerning the Locality Discrimination or Limits of the Premises, but merely a Question To "Whom certain Lands belonged." The Court of Chancery thought proper to grant another Trial; but approved the denying a View, *unless* he renewed his Consent; and made it Part of the Order for a New Trial, "that He *should* consent to the Terms." It was again tried, before Mr. Justice *Batbush*: And a Verdict was found for the * P. 256. * Plaintiff, to his Satisfaction. The Defendant moved the Court of Chancery for a new Trial: Which was refused.

Had not the Court put a *Check* to granting Views, from Time to Time, as of *Course*, a rich Defendant, conscious that the Merits were against him, might, from Pique or Humour or Litigiousness, have kept off the Cause as long as he lived, for want of a View, upon a Question where a View could not be of the least Utility.

The Wisdom and Fitness of what the Court had done to regulate Views was so fully manifested upon the Occasion of this Cause, and appeared to be so well justified by the Authority given them by the Act of Parliament and by every Principle of Justice and Convenience, that no Party has ever since moved for a View, without consenting to the Terms: And it is found in Experience, that Views are * now regularly had, and a competent Number of Viewers appear at the Trial. A View is not asked † now, except in Cases where

* At the Time of this Publication, (1765.)
† V. *supra* *



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where it may probably be of use: And as the Non-Attendance of Viewers can now gratify neither Party, Both concur in wishing the Duty performed.

The Rule that was made in the first Instance that happened after the Expedient was proposed by the Court, and was received with general Approbation as is above mentioned, was drawn up in the following Words.

“ * *Saturday* next after 15 Days of St. *Hilary* in the 30th Year * 29th January 1757.
“ of King *George* the 2d.”

“ *Pierce*, Esq; v. Earl *Faulconberg* and Others.

“ By Consent of Counsel on both Sides, It is ordered, that there
“ Issue a Writ of *Distringas Juratores*, to be directed to the Sheriff of the County of *York*; in which shall be contained a Clause
“ commanding the said Sheriff to have Six or more of the first
“ Twelve of the Jurors to be impanelled and returned to try the
“ Issue between the Parties, at the Place in Question, before the
“ Time of the Trial of the said Issue, to wit, upon, &c; And that
“ *B. R.* on the Part of the Plaintiff, and *T. W.* on the Part of the
“ Defendants, shall attend on the same Day and shew the Matters
“ in Question to the said Six or more of the first Twelve of the
“ said Jurors; And that the Expences of taking the said View shall
“ be equally born by both Parties: And no Evidence shall be given,
“ on either Side, at the Time of taking thereof.”

* “ † AND by the like Consent, It is further ordered, that in case * P. 257.
“ no *View* shall be had; Or if a *View* shall be had by ANY of the
“ said Jurors, (whether they shall happen to be any of the *twelve*
“ Jurors who shall be FIRST named in the said Writ, or not;) yet
“ the said Trial shall proceed; And no *Objection* shall be made on
“ either Side, either for want of a *View* or that a *View* was not
“ had by any of the *twelve Jurors first* named, or for that it was
“ not had by any particular Number of the Jurors named in the
“ said Writ, or for want of a proper *Return* to the said Writ.

“ On the Motion of Mr. *Norton*, of Counsel for the Plaintiff;
“ and Mr. *Gould*, of Counsel for the Defendants.”

The Cause was tried at the Bar, on the 7th of *May* 1757: And a full Jury of Viewers appeared.

† Note—The former Clause of this Rule was in the usual Form of Rules for Views where the Trial was to be by a Special Jury.

But this latter Clause (“ And by the like Consent it is further ordered, &c.”) was now first added.

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The above recited Rule was for a View to be had by a *Special Jury*; and was made absolute at once, being consented to by both Parties: But during the Remainder of the same Term (of *Hilary* 1757,) and also during the three following Terms (of *Easter*, *Trinity* and *Michaelmas* 1757,) The Court, upon proper Affidavits granted like Rules (*mutatis mutandis*) in Cases that were to be tried by *Common Juries*; making them only “to shew Cause,” not absolute in the first Instance. The next Term (*Hilary* 1758,) They made some of them, “to shew Cause;” Others, absolute in the first Instance; but none without proper Affidavits. Soon after, *viz.* in *Trinity* Term 1758, They made all these Rules absolute in the first Instance; Some, upon Affidavit; Others, as of Course: Since which Time, they are become Motions of Course, without Affidavit.

The Form of them is as follows—

If the Trial is to be by a *Special Jury*, the Rule runs thus—

It is ordered that there Issue a Writ of *Distringas Juratores* “&c, &c,—taking thereof:” [in the Words of the *first* Clause of the above recited Rule between *Pierce* and Lord *Faulconberg* and Others.*] The *additional* Clause is expressed in these Terms—
 “The Plaintiff, [or the Defendant, *viz.* the Party who prays the View] consenting that in Case *no* View shall be had; Or if a View shall be had by *any* of the said Jurors, whether they shall happen to be any of the *twelve* Jurors who shall be *first* named in the said Writ, or not; Yet the said Trial shall proceed; And no Objection shall be made, on either Side, on Account *thereof*, or for want of a proper Return to the said Writ.”

* See last Page.

* P. 258.

The Rule for a View, where the Cause is to be tried by a *Common Jury* could not continue the same, *since* the balloting Act (3 G. 2. c. 25;) as it was *before*; nor could it be *exactly* like to that for Views by *Special Juries*, (by reason of the particular Directions given by the 14th Section of the balloting Act :) But it used to run much like it, only *mutatis mutandis*. The *present* Form (*since* that Act,) is this—“It is ordered that there issue a Writ of *Distringas Juratores*, to be directed to the Sheriff of the County of Y: in which, shall be contained a Clause commanding the said Sheriff to have Six or some greater Number of the * Jurors to be impanelled and returned to try the Issue between the Parties, † Who shall be mutually consented to by the said Parties or their Agents, at the Place in Question, before the Time of the Trial of the said Issue, to wit, upon, &c; And that R. R. on the Part of the

* N.B. This Act (of 3 G. 2.) does not require them to be Six of the first Twelve.
 † These

Words are taken from the same Act of Parliament, sect. 14.

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“ Plaintiff, and *T. W.* on the Part of the Defendant, shall attend
“ on the same Day, and shew the Matters in Question to the said
“ Six or some greater Number of the † *said Jurors, who shall be*
“ *mutually consented to as aforesaid*; And that the Expences of † *V. supra,*
“ taking the said View shall be equally born by both Parties : And Note (*) (†).
“ no Evidence shall be given, on either Side, at the Time of
“ taking thereof.”

The *Additional Clause*, now added to this Rule, is in these Words—
“ the Plaintiff,” or “The Defendant,” [the Party at whose In-
stance the Rule is prayed] “ *CONSENTING* that in Case *no View*
“ shall be had; Or if a View shall be had by ANY of the Jurors, § *V. supra,*
“ whether they shall happen to be Six § *or any particular Number* Notes * & †.
“ *of the Jurors § who shall be so mutually consented to as aforesaid*;
“ Yet the said Trial shall proceed ; and no objection shall be made,
“ on either Side, on Account *thereof*, or for want of a proper Re-
“ turn to the said Writ.”

The End of *Hilary Term* 30 *Geo. 2.* 1756.

* P. 259.

* Easter Term

30 Geo. 2. B. R. 1757.

Three Judges present, *viz.*

*Lord Mansfield ;
Mr. Just. Denison, and
Mr. Just. Foster.*

(Lord Commissioner *Wilmot* absent, in Chancery.)

Friday, 29th
April 1757.

Cooper *vers.* Marshall.

THIS Case was the same Point with a Case of *Cope v. Marshall*, which had been formerly twice argued, (*viz.* on 28th *June* 1754, and 31st *January* 1755.) Both of them stood now in the Paper, for Argument; The present Case having been never argued at all, and the other having never been argued either before Lord *Mansfield* or Mr. Justice *Wilmot*.

This Case of Cooper v. Marshall stood first in the Paper, and came on first. It was an Action of Trespass for breaking entering and *digging up* the Plaintiff's *Close*, and *filling up and spoiling the Coney-burrows* there &c. And there was a 2d Count for doing the like in the Plaintiff's *Free Warren*.

Several Pleas were pleaded, by Leave of the Court.

Plea—As to the 1st Count, was a Justification under a *Right of Common* in 20 Acres &c; And that the Coney-Burrows were wrongfully unlawfully and injuriously newly-erected and kept up there:
By

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* By reason whereof the said Common was *surcharged and spoiled*; * P. 260. So that the Defendant could not enjoy *sufficient* Common in the said 20 Acres as of Right he ought. And therefore He justifies the breaking entering and *digging up* the Plaintiff's Close, and *filling up and Spoiling* the Coney-Burrows, as it was lawful for Him to do, in order to abate the said *Nusance*.

There was also a second Justification, much to the same Effect.

To the 2d Count—Were Two Justifications not much different from the former

The Plaintiff demurs to these Pleas: And the Defendant joins in the Demurrer.

Mr. Morton *pro Quer.*—The Justification arises merely from the Plaintiff's having *surcharged* the Common: And the Wording of the Plea cannot alter the Matter and Substance of it. So that the Defendant's *calling* it a NUSANCE will not *make* it so: But it really is a *mere Surcharge of Common*. Therefore the Word "NUSANCE" is here misapplied.

He cited *Cro. Jac.* 446. The Case of *Fowler v. Sanders*: Where the Prescription was treated as a Prescription to make a Nusance, though not so expressed in *Terms*.

But it is not an illegal Act, for the Lord to *place Conies* upon his own Land; though the Land be liable to Right of Common. They are Beasts of Warren, and profitable to the Lord: And the Commoner *cannot chase and kill* them.

Brañon, Lib. 4. 221. makes a Difference between a *Nocumentum justum*, and a *Nocumentum injuriosum*.

Fleta, Lib. 4. c. 26. *de Nocument' Servitutibus injurijs*, makes the like Distinction: "Nocumentorum aliud, injuriosum et dampnosum; et aliud, dampnosum et non injuriosum."

These Authorities shew that the Injury arises *only* from the *Excess*.

And the Commoner has *no such* Remedy, as the Defendant here relies on.

The Question therefore is "Whether the Commoner has a Right to DIG UP the Lord's Soil; in order to preserve his Right of Common."

The

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* P. 261.

The Lord cannot indeed *totally destroy* the Commoner's qualified Interest, contrary to his own Grant. Yet the Lord has Rights *compatible* with the Commoner's Right: And these are legal in their *own Nature*: though they may *become* injurious, by *Excess*.

On which Head, he cited *Fleta, Lib. 4. Pa. 252. [V. Pa. 252, 253, in Cap. 18. de pertinentiis.]*

But this Justification puts the latter Case upon the same Foot with the former: Whereas the Commoner's Remedy is, *really*, adequate only to the Injury done to Him. Now a Surcharge of Common is of the latter kind of Injury: And yet He here claims a Right *to dig up* the Soil and *destroy* the Conies. So that the Remedy claimed by the Justification *EXCEEDS the Injury done*. And indeed it would go further than a Judgment upon a Writ of Admeasurement would carry it: for which, He referred to *Fitzb. Nat. Brev. 295. [276]* and *Westm. 2. c. 8. [13 E. 1.]* There, the Tenant who is guilty of a second Surcharge shall only pay Damages, and forfeit the Overcharge to the King: Whereas what is here claimed, is a *total Confiscation* of the Lord's Property, for his first Injury done to the Commoner.

Authorities in Point, or nearly so, "that the Commoner cannot do this," are *Godbolt 122. Coney's Case, H. 29 Eliz.* which is full in Point: And the Principal Resolution is confirmed by *4 Leon. 7. Ould and Conye's Case S. C.* In which Case, it was adjudged "That the Commoner cannot kill or *destroy* the Conies which *destroy* his Common:" But it appears by *Godbolt*, that "He may have other Remedy. And *per Suit* Justice, he may have an Action of the Case or Affize, against the Lord, for putting in the Conies, if he has not sufficient Common left." Indeed it is said in *1 Leon. 7.* "That He hath *not* any other Remedy." But *Fleta, Lib. 4. c. 23. de admensur. Pasturæ, pa. 262, 263.* justifies Mr. Just. *Suit's* Opinion, "that He *has* Remedy;" *viz.* either Admensuration, or Affize of Novel Disseisin.

A Commoner cannot even *disfrain* the Lord's Beasts which surcharge a Common. For which Position he cited *Godbolt, ut supra, Pa. 124.* as an Authority. [*V.* what is there said *per Godfrey, arguendo*; but not any Part of the Resolution of the Case.] Much less, then, can he *destroy* them.

Cro. Eliz. 876, P. 43 Eliz. The Case of *Bellew v. Langdon*, the same Point, and adjudged accordingly; "that the Keeping of Conies by the Owner of the Soil is lawful; And the Killing them, unlawful." And *Owen 114. S. C.* (there called the Case of *Pellin v. Langden*,) *S. P.* accordingly: Which adds, that Owner of the

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* Soil may make a Fish-pond upon the Common; and that the * P. 262. Commoner could not destroy it.

Yelv. 104. *Hoddesdon Mil. v. Gresil*, *M.* 5 *fac.* *B. R.*; and *Cro. fac.* 195. *P.* 5 *fac.* *S. C.* there called *Hadesden v. Griffel*; It was adjudged "That the Commoner cannot *kill* nor *chase* the Lord's "Beasts off the Common; But his Remedy is by *Affize*, or "Action on the Case."

Agreeable to this Resolution—In a Case in *Cro. fac.* 229. *M.* 7 *fac.* 1. there called *Sir Jerom Horsey v. Hagberton*, a Plea very like the present, was over-ruled without Defence. The Case really was between *Sir Jerome Horsey* and *Mead and Havor and his Wife*. The Justification was, "of *levelling the Coney-burrows*, and *laying them smooth and even with the Ground*:" And the Reason given for doing it, was, "that *uti non potuit* his Common, *prout debuit*." Adjudged, without Argument, "that the Commoner could not do "this."

After this, the Commoners tried their Chance again, by altering their Manner of Pleading. This was in the Case in 2 *Bulstr.* 116. *Carrill v. Pack and Baker*, *Tr.* 11 *fac.*

Here, the Coney-burrows were treated, by the Justification, as *Holes* made upon the Common, by the Plaintiff, into which the Commoners Sheep fell, and that the Sheep of the Commoners often *fell into* those Holes, and were thereby *lost*: And *therefore* they justify the *chasing* the Conies, and *digging and filling up* the Burrows.

And agreeably to this Case, the Pleading in the present Case is, "That the Plaintiff erected Coney-burrows, &c."

In that Case, all the Cases and Arguments were urged: And yet it was adjudged against the Defendant; who had justified the *Chasing* the Conies, and *digging down* the Burrows and *filling up* the Holes.

Since which Time, the Grand Point has never come in Question.

Mr. *Aston pro Def*."

In the first Place, it does *not appear* that the Defendant *did KILL* any of the Conies: though Mr. *Morton* would suppose that to be implied in his digging and filling up the Burrows.

X x x

The

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* P. 263. * The Lord may feed or depasture the Common, I agree: And the Commoner cannot *kill* or *chafe* his Cattle.

But it does not follow that where *Necessity* obliges the Commoner to *abate a NUSANCE*, he may not do it.

And Surcharging a Common with Rabbits in a great Degree, is a private NUSANCE.

1 *Hawk. Pl. Cor.* 197. c. 75. treats of Common Nufances, and how they may be removed. And He says "that any One prejudiced by a private Nufance may destroy it." *Pa.* 199. § 12. is express.

2 *Rol. Abr. Tit. Indictment*, Letter Q. *Nufance*, Pl. 7, 8. A Presentment of a Surcharge of Common is not good: Because it concerns a private Interest. The same, of an Inclosure of Common, in Nufance of the Commoners.

Bracton, Lib. 4. c. 21. *Pa.* 221. shews that though the Act was *legal at first*, the *Excess* makes it a Nufance.

But here the 2d Plea is "That the Lord has erected so many Coney-burrows that the Commoner had *not sufficient* Common left." And this Fact is *admitted* by the Demurrer. Therefore the Lord has broken through the Bound of Right between the Lord and the Commoner.

The Lord cannot inclose or build upon the Common.

And there are no *Degres* of Insufficiency: The only Question is "Whether there be or be not sufficient Common left:" As in the Case in 2 *Mod.* 7. *Smith v. Feverel*.

And the Commoner may in such Case abate the Nufance. 2 *Inst.* 88. is in Point. 15 *H.* 7. 10. *b.* is also in Point. He may ALSO, indeed, if he chooses it, bring an Action of Trespass or Affise. But he *may* abate them, *without* Suit. *Hale's Analysis* 110. [*V. pa.* 125. § 42.] *Robert Mary's Case*, 9 *Co.* 112. *b.* affords the Reason: *Viz.* the preventing Multiplicity of Suits.

As to the Doctrine of the Commoner's not meddling with the *Sail*.

The Lord could approve *before* the Statute of *Merton*. 1 *Ro. Rep.* The Case of *Sir S. Proctor v. Sir J. Mallorie*; *per Coke*; and agreed

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* agreed to by the Lord Chancellor. *Fitzb. Title Approvement* * P. 264. (there cited.)

And this appears too by the Writ of *Quod permittat*. *Bracton*, *Lib. 4. pa. 227. b.* (the Writ there) shews that the Commoner might pull down Pales &c. *2 Inst. 88. ad idem.*

This is like all other Cafes of Nufance: A Person *may abate* a Nufance to his Property, though upon the Land of another. *9 E. 4. 35. a.* is so.

As to Mr. *Morton's* Cafes—There is no material Difference between destroying a *Hedge*, and destroying a *Coney-burrow*. Now *2 Mod. 65.* The Case of *Cæsar v. Maſon* is in Point, “That the Commoner may prostrate and abate a *Hedge*.” And surely that is meddling with the *Soil*.

And there *may* be Cafes where the Commoner may chase off the Lord's Beasts: As suppose they are infected,

As to *Cony's* Cafe, it was very different from the present: For there the *Killing and carrying away* was justified: Whereas We do not justify Killing, chasing, or taking away.

So, the Case of *Bellew v. Langden* was *Killing*. There was no Pretence of any Surcharge of Common. It is a Justification of Killing the Conies as being Damage-feasant: And it's only adjudged there “that the Killing them was unlawful.”

So *Yelv. 104.* was *chasing and killing*.

And in those Cafes, there *might be sufficient* Common left, for aught that appears to the contrary, in any One of them.

Sir *Jerome Horsey's* Cafe is not like this. That is for breaking a *Warren*: And the *Coney-Burrows* there are not said to be *newly* erected. And it was done *to prevent* the *Coney-Burrows* increasing, *so as to be* a Nufance: Not averring “That they were *then* a Nufance.”

Whereas here it is averred *to be* a Nufance, and a *new* Erection.

As to the Case of *Caryl v. Pack and Baker*—'Tis for entring the Plaintiff's Free Warren, and digging the Land. And there, in the Justification, it is alledged to be done for the *BETTER Preservation* of the Common. And the free Warren is admitted: And therefore he could not justify the *killing* &c.

As

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* P. 265. * As to a Pond—If it was so large as not to leave sufficient Common, it would be a Nuisance, and *might* be abated.

1 *Lutw.* 101. The Case of *Haffard v. Cantrell* (which was mentioned on a former Argument) was only “that the Commoner “ could not enjoy his Common *in so beneficial and ample* a Manner as before.” But it does not say, as here, “that there was “ *not sufficient* Common left.” Which is going a great deal further than that Case does.

Mr. *Morton* in Reply—

Mr. *Aston* agrees that the Act of the Lord is *legal*. Therefore it is not like Acts which are against his own Grant; or Cases which become *manifesta Disseisina*.

“*Uterius* Nocumentum” imports a *present* Nuisance—

Lord MANSFIELD stopped Mr. *Morton* in his Reply.

“Whether it be or be not *hurtful*,” or “how far it may be “ so;” is not the Question: The Question turns upon the REMEDY; “Whether it is *Abatable*; Whether the Commoner can “ do *Himself* Justice.”

It may be *Prejudicial* to the Commoner, yet not *Injurious*: It may be both *Prejudicial* and *Injurious*, yet not *Abatable*.

The Lord, by his Grant of Common, gives *every Thing* incident to the Enjoyment of it, (as Ingress, Egress, &c;) And thereby *authorizes* the Commoner to remove every Obstruction to his Cattle Grazing the Grass which grows upon such a Spot of Ground: Because every *such* Obstruction is directly *contrary* to the Terms of the Grant. A *Hedge*, a *Gate*, or a *Wall*, to keep the Commoner's Cattle out, is *inconsistent* with a Grant which gives them a Right to come in.

But the Lord still remains *Owner of the Soil*; and is not debarred from exercising any *Act of Ownership*.

The *Commoner* has no Right to meddle with the SOIL.

The *true Distinction* is taken in the Case of *Mason v. Caesar* in 2 *Mod.* 66: Where the Court was of Opinion “that the Defendant, a Commoner, *might* abate the *Hedges*; For thereby He “ did not meddle with the SOIL, but *only* pulled down the *Erection*.”

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* The *Hedge* stopped the Commoner from entering, and putting* P. 266.
in his Beasts. The Grant gave Him Leave to enter, and put in
his Beasts: Therefore it *virtually authorized* Him to remove any Ob-
struction *directly repugnant* to that Liberty,

But in the present Case, the Lord has done *nothing contrary* to
the Grant: He has *not obstructed* the Commoner from entering and
putting in his Cattle.

The Lord has a *Right* to put *Conies* upon the Common: As ap-
pears from the Case of *Carrill v. Pack and Baker*, in 2 *Bulstr.*
115, 116.

The Conies themselves naturally make the *Burrows*. So that
they are *incident* to the Right of putting on the Conies.

If the Lord surcharges, the Commoner is *injured* in his Right
of Common, it is true: But what is the Commoner's *Remedy*? Not,
to *abate*: Not to be his *own Judge*, in a complicated Question,
which may admit of Nicety to determine.

There is a certain *Line* to be drawn: The Lord has a Right *so*
far; but *no further*. Yet the Commoner cannot *destroy* or *drive*
off the Conies: Nor, consequently can he *destroy the Burrows*;
which is, in Effect, destroying the *Conies*.

This is founded upon Reason, and upon many Authorities.

Sir *Jerome Horsey's* Case. [*V. ante*, 262.] 2 *Bulstr.* 115, 116.
The Case of *Carrill v. Pack and Baker* [*V. ante*, 262.]

And it's being a *Free Warren* makes no Difference.

So that the Question is not, "Whether this be an *Injury*": but,
"Whether it is *ABATABLE*."

I think it so clear a Case, that I have no Difficulty at all about it.

Mr. Just. *Denison* declared the same Thing: And He said He
saw no Difference between this Case, and the Cases cited: but
merely in the *Expression*, *viz.* that in this Case it is treated as a *Nu-*
sance; which is not the *Expression*, in them. But this *Form of*
Expression makes no Difference.

Upon this Record, it must be taken, "that the Plaintiff was
" *Owner of the Soil*, and *had a Free Warren*; and that there is not
Y y y " *sufficient*

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* P. 267. “ * *sufficient Common left*, (by the Increase of the Conies) for the use
“ of the Commoner.”

The Question then is, “Whether the Commoner shall be in-
“ trusted to *destroy the ESTATE* of the Lord, in order to preserve
“ his own *small Right* of Common.”

1 *Rol. Abr.* 405. *pl.* 2. gives the *Reason* why the Commoner can-
* Yet Roll not * kill the Conies, but ought to bring his Affize or Action;
says, “Dub- *viz.* “because he cannot be his own Judge.”
“tatur.”

So here, this Justification would make him a Judge in his own
Cause. No: Let him take his *proper Remedy*.

This is plain Reason; even if it was *not* supported by Authori-
ties: But the Cases are also strong, to prove it.

The only Point of this Case turns upon these Pleadings CALLING
it a *Nufance*.

But this will *not* MAKE it a Nufance *abatable by the Defendant*
Himself; nor can it alter the *Law*.

In Sir *Jerome Horsey's Case*, *Cro. Jac.* 229. It was adjudged
“ that the Commoner has no other Interest than to take the Com-
“ mon, by feeding his Cattle there: And *may not destroy* the Co-
“ nies nor Coney-burrows.”

A Coney-burrow is *not*, of its own *Nature*, a Nufance: On the
contrary, it is essential to a free Warren.

Therefore the *Nufance* depends upon the *Number* of them: And
You can, at the utmost, only abate *so much* of the Thing as is a
Nufance. You can not destroy the *Whole*, (which is the Right here
claimed;) but only *so much* of the Thing as *makes* it a Nufance.

In 1 Sir *J.* S. 688. In the Case of *Rex v. Papineau*, Lord Ch.
Just. *Raymond* expressly declares so. Suppose a Man builds his
House up so high, as to be a Nufance to his Neighbour, by ob-
structing his Lights or in any other Respect arising from its *Excess*;
You can't destroy the *whole* House; but only *so much* of it as by its
Excess above what is allowable, constitutes the Nufance.

Mr. Just. *Foster* was of the same Opinion.

This Justification is clearly bad. It is founded on a Claim of
Right which cannot be maintained.

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* It is admitted "that a Commoner can not, in this Case, *destroy* * P. 268. the *Conies*." Consequently, He cannot destroy the *Burrows*: For the Effect is destroying the *Conies*.

If the Lord has exceeded the Bounds of his Right, the *Law* is to determine the *Quantum* of such *Excess*; and to the Law the Commoner must resort for his Remedy, if He is aggrieved.

Per Cur. unanimously
JUDGMENT for the PLAINTIFF.

See the next Case—The same Point.

Cope v. Marshall.

H. 27 G. 2. Rot'lo. 145.

THIS being the same Point with the last preceding Case of *Cosper v. Marshall*.

THE COURT without Argument at this Time, (but this very Case had been argued twice before, * though not before Lord *Mansfield* * V. ante 259. and Mr. Just. *Wilmot*,) gave the like Judgment as last above, viz.

JUDGMENT for the PLAINTIFF.

Hope, ex dimiss. Brown et Ux: v: Taylor:

THIS came on, upon a Case stated, upon the Trial of an Ejectment.

The Case stated was this—

Robert Johnson, seized in Fee (*inter alia*) of a *Copyhold* of Inheritance, and having first surrendered to the Use of his Will devised to *John Wedgeborough*, his Sister's eldest Son, his House in the Brook with the Out-buildings; and 30*l.* to be paid within Twelve Months after his Decease; To his Nephew *Robert Taylor*, 50*l.* to be paid within Twelve Months after his Decease; To his Nephews *Charles Taylor*, *Robert Taylor* and *William Taylor*, his Sister's three Sons, 29 Acres of Arable and Meadow Land bought of *B*; not to be parted but to part the Rent equally between them; then, to WILLIAM TAYLOR,

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* P. 269. TAYLOR, his Sister's Son, the House in question, by the Description of "his House on the Green; with the Ground and Out-houses thereto belonging;" And gives him also 10 l; And to his *Brother-in-Law Charles Taylor* 5 l: And He directs the said Legacies to be paid *within 12 Months* after his Decease: And declares his Will and Meaning to be "That if either of the Persons before named *die without Issue* lawfully begotten, then the said LEGACY shall be divided equally between *them that are left alive.*"

Note—It was stated that the Testator had *five* Houses in all: And that the Will begun with this Expression, "As to ALL *my wordly Estate &c.*" And it concludes thus, "And all the REST of my Houses, Goods, Lands, and Cattle, I give to my Kinswoman *Elizabeth Wedgeborough*; and make Her my sole Executrix.

The Testator died seised of the said five Houses and Lands.

William Taylor entered, and was admitted, and enjoyed till the 13th of *June* 1755; when He died, leaving the Defendant *William Taylor*, his only Son and Heir at Law.

The Wife of *Brown*, the Lessor of the Plaintiff, is Heir at Law to the Testator; And, as such, brought this Ejectment, against the Defendant *William Taylor* the Son, who claims as Tenant in Tail.

In this Case, there are made

Two POINTS, which are [in Substance]

1st. What Estate *William Taylor*, the Devisee, took by the Will; viz. Whether an Estate Tail, or for *Life* only.

2dly. If only an Estate for Life, then Whether the Residuary Clause did not carry the *Reversion in Fee*, to the *Residuary Devisee*: (In which Case, the Heir at Law could have No Claim.)

Mr. *Clayton* for the Lessor of the Plaintiff, the Heir at Law.

To the 1st Question, He argued that *William Taylor* the Defendant's Father, took only an Estate for *Life*; not an Estate Tail.

The Devise is only to *William Taylor Himself*; without any further Limitation whatsoever.

The subsequent Words are, "that if either of &c. shall die without Issue, then the said LEGACIES to be divided amongst the Survivors."

Now

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Now the Word "LEGACIES" will be satisfied by the *Money-Le-* * P. 270.
gacies: And there were *Four* Money-Legacies before given, There-
fore this Clause shall not be extended to the Devise of *real* Estate.
For an Heir at Law shall *not* be disinherited, by *doubtful* Words,
or by *Implication*.

2d Question, Upon the *Residuary* Clause.—

The *Residuary* Clause does *not* carry the *Reversion in Fee* in these
Permisses in question, to *Elizabeth Wedgeborough*.

There were *OTHER Lands* besides these, for the Words to ope-
rate upon: And these Words here are, "all the *Rest* of my Houses
"Lands &c."

3 *Peere Wms.* 56. The Case of *Chester v. Chester* was a Case,
(and many other Cases might be mentioned,) where there were *no*
other Lands for the Words to operate upon.

But here He had *FIVE* Houses; And *only* 3 were devised: So
that "*Rest*" means his *other* Houses.

But (What goes to both Points—)

This was *Copyhold*: And he had likewise *Freehold* Lands, distinct
from the *Copyhold*: And therefore the *Copyhold* not being *parti-*
cularly named, the Words of the Devise shall only extend to the
Freehold. Which is fully proved by two Resolutions in *Cases in*
Equity abridged, pa. 124. pl. 13. & pl. 14.

Mr. *Nares pro Defend*.

He made the same two Points, with Mr. *Clayton*.

1st. The Testator had no Child, but several Nephews; *viz.*
7 *W.* his Sister's Son by a former Husband, and 3 Nephews *Tay-*
lors, her Sons by a latter Husband: And He gives Houses and Le-
gacies amongst them, in different Proportions.

The Word "LEGACY" relates, and the Testator intended it to
reale, to the Houses, *as well as* to the Money-Legacies. He could
never intend to give such a Trifle as the *Interest* of 5 *l.* to his Bro-
ther-in-Law, for his Life only. And it may be observed, that if
this *Charles Taylor*, the Testator's Brother-in-Law, (one of the
Legatees above named) shall happen to die *without Issue*, the other
3 Legatees (his 3 *Sons*) must consequently be dead too: And then
there would be *no Body* left alive, to divide it amongst.

Z z z

And

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* P. 271. * And if the Word "LEGACY" relates to the *real* Estate, it is a clear Estate Tail in *William Taylor*. (Which Position Mr. *Clayton* agreed to.)

2d Question—The Will begins, "As to *all* my wordly Estate" Therefore He meant to pass *every* thing by this his Will.

The Cases of *Ibbetson v. Beckwith*, [Forrester 157.] M. 1735, 2 Canc. and of *Tanner v. Wife*, in 3 Peere Wm. 295. both of them prove this.

1 Lev. 212. The Case of *Cooke v. Gerrard* is expressly in Point—"That the Word *Land*" in a Devise meant not only the Thing itself; but the "*Interest* of the Thing."

As to Cases in Equity abridged 124, there was no Surrender of the Copyhold Estate: But it is here stated "that the Testator had "*surrendered* the Copyhold Estate, to the Use of his Will" Which renders his Intention clear, to *dispose* of it.

However, this Reasoning only reaches the 2d Question: For the *first* Devise is *express*.

And the Defendant is Son and Heir to *William Taylor*.

Therefore He prayed Judgment of Nonsuit against the Plaintiff.

Mr. *Clayton* in Reply—

All the Money-Legacies are to be paid within a Year. Therefore the Event must happen *within* that Year: Or else the eventual Devise could not take Effect.

The Word "*Rest*" clearly *excludes* what He had *before* devised

LORD MANSFIELD—Mr. *Clayton* admits that *if* the Word "LEGACY" is *applicable* to Lands, W. T. has an Estate Tail.

This is plainly a Will of the Man's *own* drawing.

He professes to dispose of his *whole* Estate. He means to make *One* of his Relations his General Heir: The *other* Objects of his Bounty are 4 Nephews. And He gives them Land; And also gives some pecuniary Legacies, to be paid *within* 12 Months after his Death: (Which indeed the *Law* would have implied.)

Tlen

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* Then He gives his Brother-in-Law 5 *l*.

* P. 272.

And if either of these Persons before named shall *die without Issue* lawfully begotten, then he gives the “said LEGACY” to those that shall be left alive, to be equally divided between them.

The Explanation of this Word “LEGACY” must be governed by the *Intention* of the Testator: And to this Purpose, some Strefs may be laid upon this Introduction of the professed Disposition of *All* his worldly Estate. A *different* Construction has been sometimes put upon the very *same* Words, as applied to Money and Lands; in order to *support the Intent* of the Testator: As in the Case of *Forth v. Chapman*, by Ld. Macclesfield.

It is *most agreeable to the Intention* of the Testator in this Case, to construe this Word “Legacy” to extend to *Land*.

It would *not* be a *legal* Limitation, if confined to Money.

The Legacies may happen to be *spent*, soon after the Twelve-month is expired.

And it could never be intended that so *small* a Sum as the 5 *l*. should be put out to Interest, and keep liable to this Limitation.

If the Brother-in-Law died *without Issue*, there would be *No One left* to divide the Legacies.

Common People do not make such Distinction between Money and Land, as Persons conversant in Law Matters do.

The Testator meant this Clause as a Restraint upon his former Bequest; and meant that the Issue should have it.

The Word “Legacies” *does* extend to Lands, as well as to Monies. Common Persons would not think of using the Word “*Devise*.” (Which is the more usual *legal technical* Term.)

Therefore upon the 1st Question I think it is an Estate *Tail*.

But his Lordship did not choose (it not being at all necessary) to declare any Opinion upon the 2d. Question: because a third Person not now before the Court, might be affected by it.

Mr. Just. *Denison* concurred—He thought the Word “LEGACIES” extended to *real* Estate; And consequently that it was an Estate *Tail*.

Mr.

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* P.273. * Mr. Just. *Foster* also held That the Testator *intended* the Land to go over ; and that it was an Estate *Tail*.

If the Word "LEGACY" was confined to *pecuniary* Legacies, the Devise over could not have taken Effect ; being *after* a dying without Issue ; [*V. Ante P. 272. Lord Mansfield* accordingly.]

Besides, *Charles Taylor* who was One of the Persons before named, has *no pecuniary* Legacy given *him*, so that it *must* mean Land ; as to HIM.

And these are *small* Legacies, (one of them only of 5*l.*) And payable within a *Twelvemonth*. Therefore the Testator cannot be supposed to apply this Limitation to *them* ; but to the LAND which He had devised by his Will.

Per Cur. unanimously
JUDGMENT for the DEFENDANT
(*viz.* of NONSUIT of the PLAINTIFF.)

Saturday,
30th April
1757.

Denn *vers.* Lord Cadogan et al'.

THIS Day having been appointed for a Trial at Bar, in this Cause, ONLY 9 of the *Jury* appeared.

Sir *Richard Lloyd pro Quer'* prayed a *Decem Tales*.

By the Course of the Court, this Trial could not have come on again, *till Michaelmas* Term ; (the immediately next Term being an *Issueable* Term, wherein there are *no Trials at Bar*.)

But the Court observing the great Expence and Delay which would by this Method of Proceeding be occasioned to the Parties, asked "Whether there were Gentlemen of the County enow in "Town, to make a Complete Jury."

And being told "that there *were* ;" And the Gentlemen of the Jury who now attended, expressing a Desire "not to be kept in "Town."

The COURT ordered the Return of the *Decem Tales* to be on the *Monday following* ; (though there had never been before an Instance of it.)

And

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*And by so doing, they saved vast Expence, as well as some Delay * P. 274.
to the Parties concerned.

For now, on *Monday 2d May 1757*, a full Jury appeared: And the Trial proceeded.

The Cause itself had no Difficulty in it; And was soon over.

For the Lessors of the Plaintiff claimed as Heirs at Law of *George Smith Esq*; who died in 1607: And they drew down their Descent through two Sisters, who had married *Carlos* and *Underwood*. One of their other Ancestors, as they pretended, was *Francis Smith*, third Brother of the first Lord *Carrington*, (*Charles Smith*, alias *Carrington*;) But they could not by any Means make this out.

Their Claim was as Heirs at Law, under a Family Settlement of the Lord *Carrington*, in 1687. But they could not shew the least Probability that *Francis* the third Brother of the Lord *Carrington* (whose Estate was prior to the Plaintiff's Claim) was *dead without Issue*.

Whereupon the PLAINTIFF WAS NONSUITED.

The COURT, on the Application of the Gentlemen of the Jury, *took off the Fines* (of 20 *l.* a-piece) which had been set, on *Saturday* last, upon the Defaulters.

Hawkins *vers.* Colclough.

Trin. 29, 30 G. 2. Rot'lo 962.

(*Lord Commissioner Wilnot absent, in Chancery.*)

Tuesday,
3d May
1757.

IN an Action of Trespass for an Assault Battery and false Imprisonment an AWARD (made pending the Action) being pleaded to this Action, and a Tender of the Sum awarded; The Plaintiff demurred.

The Award (which was made upon a Submission of all Disputes, &c.) was in these Words—"Whereas there has been a Suit at Law
" between the Parties, that hath run to a great Expence on both
" Sides; And it being left to me to make an End of it; I determine
" That they shall Each of them pay their own Charges at Law;
" And that the Defendant pay the Plaintiff five Shillings, for his making the first Breach in the Law."

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* P. 275. * Mr. *Anguish pro Quer'* objected to the *Award*, as being

1st. *Uncertain*;

2dly. *Not final*.

First—It is *uncertain*. The Submission is of *several* Matters: And the Award does not at all shew, *which* of them it means to determine. 1 *Ro. Abr.* 242. Letter B. *pl.* 1. 252. *pl.* 10.

And an Averment without a Fact to support it is of no Avail. 1 *Ld. Raym.* 246. in the Case of *Bacon v. Dubarry*, the 4th Resolution is expressly so.

This is an Action of Trespafs. The Submission is of *all* Trespaffes: And the Award does not distinguish *what* Trespaffes it determines. 1 *Ro. Abr.* 251. Letter I. *pl.* 1. and *pl.* 3. and the Case of *Maw v. Samuel* in *Popbam* 134. and 2 *Ro. Rep.* 1. the Case of *Bacon v. Dubarry* (before cited.) The 3d Resolution says “That the “Award was void for the Uncertainty, without Releases.”

Now *here* are *no* Releases. Each is to pay their own Charges. And the Defendant is awarded to pay to the Plaintiff 5 s. for his (the Defendant's) having been guilty of the first Breach of the Law.

The Injury complained of was Assault Battery and false Imprisonment. And here is no Satisfaction awarded for the Injury. 1 *Ld. Raym.* 247. The Case of *Freeman v. Bernard*.

Second Point—'Tis *not final*: Which it ought to be.

An Award must be *final*. But this Award was made pending the Action: And it does not put any End to it, at all.

Under this Head, He cited 1 *Ro. Abr.* 252. *pl.* 16, 17. [But One of these is marked by the Abridger, “*Dubitatur*: The other, “*Contra* 15 *H.* 7. 22.”] Also 2 *Strange* 1024. The Case of *Tipping v. Smith*: Where the Award was held ill; being uncertain, and not final. And *Cro. Eliz.* 904. The Case of *Colston v. Harris*: Where the Award was holden void; because Nothing was awarded to the Defendant, nor to be free from Suits: So no Advantage to Him.

Mr. *Caldecot contra pro Def.*

This Award is pleaded by Consent of the Plaintiff, and by Leave of the Court. And though pleaded as being made pending the
Action,

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* Action, *viz.* between the Action brought and the Plea pleaded ; * P. 276. yet the Court will determine upon the mere Validity of it.

1st. It does appear upon what particular Suit, the Award was.

The Generality of the Submission is not inconsistent with the Particularity of the Award. 8 Rep. 98. *b. Basspole's Case*. [2d Resolution.]

This shall be taken to be the *whole* Matter depending between the Parties : And *no other* Suit than this appears to have been depending, between the Parties.

The Case of *Bacon v. Dubarry*, in 1 *Ld. Raym.* 246. is not like or similar to the present Case.

After Payment made or tendered, the Action of Trespas is *discharged*.

Hob. 49. The Case of *Nicholls v. Grunnion* is expressly so. [The Words are—" For a *Satisfaction* implies a Discharge."]

The present Award (which was made by a *Cobler*) recites that there was such a Suit; And that it being left to Him to make an End of the said Suit, He determined as follows, *viz.* " That the " said *J. H.* and *J. C.* should each of them *pay their own Costs and " Charges at Law*; And that the said *J. C.* should *pay the said J. S. " 5 Shillings for his making the first Breach in the Law.*"

And this may be pleaded in Bar, in another Action.

The Arbitrator certainly *intended* to make an End of this Suit depending between the Parties; and thought *5 s. adequate to the Injury*.

Mr. Anguish in Reply—Notwithstanding the Consent " to plead " this Award in Bar," Yet all Objections to the Award itself are still open.

This is *not shewn* to be the *only* Matter between them: And *non constat* that the Award was made concerning this *particular* Action.

I agree that *Payment* discharges the Trespas. But then it ought to appear that the Payment was in Satisfaction of the *SAME Trespas*. Which does not appear in this Case.

LORD

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* P. 277. * LORD MANSFIELD—

The Question is Whether this be a *good Award*.

Awards are now considered with *greater Latitude* and *less Strictness*, than they were *formerly*. And 'tis right that they should be *liberally* construed; because they are made by Judges of the Parties *own Choosing*. And this is often, (as it is here,) in Cases of *small Consequence*, where the Play is not worth the Candle.

Indeed they must have these two Properties, to be *certain*, and *final*.

But the Certainty may be judged of according to a *common Intent*, and consistent with fair and *probable Presumption*.

This Submission is, in *general Terms*, “of *All Actions, Controversies and Suits between them*.” The Arbitrator recites *ONE*; referring to the Submission, as authorizing him to determine it: And it appears that *this Suit was depending* between the Parties. And the Parties have *not desired to be heard* upon any more than *this One*. Therefore there is *no probable Presumption* of any *Other*.

2dly, As to its being *final*—It seems to be a reasonable and fair Award.

The Arbitrator, plainly, thought it a *MERE TRIFLE*; and seems to have thought *both Parties* to have been in the wrong; and therefore awarded each to stand by his own Costs.

And the 5 s. awarded to be paid, is plainly in *Satisfaction* of this *same Action*; and therefore is a *Discharge* of it, being paid or tendered.

✎ And he declared against *critical Niceties*, in scanning *Awards* made by Judges of the Parties *own choosing*, in order to the Determination of Disputes between them.

Therefore He was clear that the Judgment ought to be for the Defendant.

Mr. Just. DENISON concurred—

The Submission is *General*: The Arbitration is alledged to be “*de et super Præmissis*,” And it *does not appear* that any *Thing else* was before the Arbitrator. It's plain that *this Matter* was *submitted*: And We have *no reason* to *presume* “that there was any *other*.” And

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* And it is *sufficiently final*: It is to pay 5 s. FOR having been guilty * P. 278. or the first Breach of the Law. Therefore it is the *same* as if it had said “*in Satisfaction*.” Therefore it is mutual and final.

And *Awards* ought to be construed *liberally* and *favourably*.

Mr. JUST. FOSTER concurred, for the Reasons already given.

JUDGMENT for the DEFENDANT.

Perry v. Nicholson,

AFTER an unsuccessful Motion, made on the Part of the Defendant, “to set aside an Award;” and an equally unsuccessful One, made on the Part of the Plaintiff, “to enforce it by an Attachment for Nonperformance;” The Plaintiff found Himself obliged to have Recourse to his *Action* against the Defendant upon it.

And now, upon an Action of Debt brought by Him on this Award, reciting that in an Action of *Assumpsit*, the Parties, at the Trial, had submitted *the* Matters in Difference in the SAID CAUSE, to certain Arbitrators, &c, so as they should publish their Award IN WRITING concerning the Premises, before, &c; And that they accordingly did publish their Award IN WRITING, &c, and awarded “that the Defendant *Nicholson* should pay to the Plaintiff *Perry*, “48 l. 11 s. 10 d. in full Payment Discharge and Satisfaction of all “Money whatsoever or any Ways due or owing unto *Perry* by “*Nicholson*, at the Time of commencing the said Action; and that “ALL Actions depending between them for *any* Matter, Cause or “Thing *whatsoever* arising before or at the Time of referring should “*from thenceforth cease*; and that upon Payment of that Sum, they “should within two Days after the *Taxation* of Costs in the Action and Payment thereof to *Perry*, seal and execute to each “other, GENERAL Releases of all Matters in Difference in the said “Cause.”

Then the Plaintiff avers that there was, at the Commencement of the Action, or at the Time of Reference, *no other Money* whatsoever, any Ways due to Him the said Plaintiff *Perry* from *Nicholson*; but the Matter in Difference in the said Cause; And that *No other Action* was depending between them; And that the Costs were *taxed* at 28 l.

The Defendant pleads “that no such Award was made.” Replication—“that there was such an Award, &c.” And Issue thereupon.

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* P. 279. * The Plaintiff gave in Evidence, an Award in Writing, *indented*, under the Hands and Seals of the said Arbitrators named in his Declaration and Replication, with the following *Variations* from and Additions to the Award set forth in the Declaration—*viz.* There was in the Declaration,

1st. An *Omission* (after the Award “to pay, &c.”) of these following Words—“That *Nicholson* at the same Time *deliver up* “to Perry a *Promissory Note* of Perry’s payable to *Nicholson* or “Order for 5 l. 7 s. to be cancelled.”

2d. A *Misrepresentation* of the Release: Which is “that they “should execute *MUTUAL and general* Releases of all Actions, &c. “Debts, &c. for any Matter Cause or Thing whatsoever from the “Beginning of the World *unto the Day of the Date* hereof.”

3dly. The Award produced in Evidence, is by Deed *indented, under Hand and Seal*: Whereas the Award declared upon is only an Award “*in Writing*,” merely.

Upon this Evidence, there was a Verdict for the Plaintiff, subject to the Opinion of the Court, on this Question,—“Whether “there be *MATERIAL Variances* between the Award declared upon, “and the Award given in Evidence.”

Mr. Serjeant HEWITT—*pro Quer’*.

This Action is an Action of Debt on *the* AWARD itself; Not an Action of Debt on the Arbitration BOND: And on *such* an Action, no more needs be set out, than is material, and enough *to intitle the Plaintiff* to his Demand. 1 Leon. 72. the Case of *Smith v. Kirfoot*. 1 Salk. 72. the Case of *Foreland v. Marygold*. Both which Cases are expressly so.

Another Rule concerning Awards is, that the *Generality of the Words* of them may be *restrained*, so as to be construed to amount to no more than they ought to amount to. One Way of doing this, is by *Averment* connecting the Award with the Submission: As it is said in the Case in *Aleyn* 51, 52. *Rose v. Spark* [first Point.] “That “the Words *de Præmissis* have been newly used in pleading Awards; “in order properly to apply the General Words proportionable to “the things submitted.”

Another Way of doing this, is by pleading them according to their *legal Operation*.

Another Way of restraining the Generality of Words is by *Intendment of Law*: As was done in 1 Salk. 74. *Simon v. Gavil*.

Another

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* Another Way is by *pleading the Matter*; (which is the proper * P. 280. Way for the Defendant to take Advantage of it :) As in *Moore* 885. N^o. 1242. The Case of *Lea v. Paine*.

Another Way is, that an Award may be *good in Part*, and *bad in Part*; if relative to distinct Things.

To apply these Positions—Here are four Things awarded: Which it is true, are not all particularly set forth.

But ALL *that is NECESSARY to THIS Suit*, is set forth; The Other Things are not relative to it. And here is an *Averment* “That *no other Thing was in Dispute.*”

The Question is, “Whether this Award produced in Evidence *proves the Declaration.*”

Now *All that is material* in the Declaration, upon *this* Action of Debt upon the Award, is the Award of the 48 *l.* and the 28 *l.* Costs. So that it is sufficient to prove the Declaration.

Mr. ANGUISH *contra pro Def.*

1st. Here is an *Omission* of that Part which obliges the Defendant *Nicholson* to deliver up a Note: Which Note composes Part of the Sum, and was in Consideration to make up the 48 *l.*

To suppose it otherwise, is inconsistent: Because, otherwise, they would not have ordered it to be given up.

He cited 2 *Lev.* 235. The Case of *Adams v. Statbam*: Where an *Omission* vitiated the Award.

LORD MANSFIELD—after stating the Case, said that nothing was clearer, than that in an Action of Debt UPON *an* AWARD, a Man has *no* Need to *state in his Declaration any more* of the Award, than supports his Case.

If there be any Thing by way of *Condition precedent* to the Payment of the Money, the *Defendant* may *set it out* in pleading.

This has been the Law, so long ago as from the Time of the Register: Where there is a Writ which sets forth only so much as is necessary. [*V. Register* 111.]

Then

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* P. 281. Then with Regard to the *Release*—The Court will *intend* that the *Release* shall extend ONLY to the Matter under the Submission. Besides here they have averred “that there was no other Matter in Variance.”

Therefore I think there is NO *material Variance* between the Declaration and the Evidence.

Mr. Just. DENISON—was as clearly of the same Opinion: Which he declared to the following Effect.

The Question is “Whether the Award given in Evidence is sufficient to support the Award set forth in the Declaration.”

Now Nothing is claimed by *this* Action, but the Money.

And the Question is Whether it was necessary, in *this* Action, to set forth any Thing MORE *than* supported his Claim to recover, and shewed his Right to *this* Money.

It has been settled that in Actions *upon* AWARDS (which are no Specialties,) there is no Occasion to set forth the *whole* Award: The Plaintiff needs not shew any thing *more than* what is necessary to support that *particular* Claim; and to intitle him to the *Thing*; And if the Defendant will *impeach* the Award for any thing, that is to come on HIS Part.

1 Leon. 72. *Smith and Kirfoot's Case*, is expressly so resolved.

Littleton's Rep. 312, 313. *Leake v. Butler*, is a like Resolution: Where the Form of declaring is said to be taken from a Writ in the Register 111.

And *this Distinction* between Debt upon the Award itself, and Debt upon the Arbitration-Bond, was admitted in

1 Salk. 72. the Case of *Foreland v. Marygold*: Which was an Action of Debt upon Bond to perform an Award. And 1 Lord Raym. 715. *Foreland v. Hornigold* is the same Case: Where also it appears to have been an Action of Debt upon the Bond.

Here, the Award is “That *Nicholson* shall pay the Money, and “deliver up the Note.” And this is an Action of Debt brought by *Perry*, UPON *this* AWARD, for the Money. It would, as I have already said, have been a quite different Case, if it had been an Action *upon the Arbitration-BOND*. But it is *here* good, even

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* even though on the mere Face of the Declaration it should appear *as a bad Award*, by appearing thereupon and as there set forth, as if it were only an Award on one Side. For the Plaintiff, in *this Action* upon the Award itself, needed only to shew *such Part* as he grounds his Action upon. * P. 282.

Then as to the *Releases*—The Award “ of *General Releases*,” was *void, as to OTHER Matters* not submitted. Here, nothing is submitted, but in *this particular Action*. And in an Action upon the Bond, “ a Release as to *all Matters under Submission*,” would be a good Plea; though the Award be an Award of “ *General Releases*.”

But here it is *expressly averred*, “ that there were NO OTHER “ *Matters in Dispute*.” However, there was no Occasion for that Averment, because We *would NOT have intended* “ that there were “ *any other*.”

Mr. Just. FOSTER was of the same Opinion.

He said it was sufficient in an Action of Debt *upon the AWARD ITSELF*, to set forth *so much* only as is necessary to support the Plaintiff's Claim: The *other Part* of the Award may, perhaps, *be performed*.

He thought therefore, that the Evidence well proved the Declaration.

Per Cur. unanimously (Mr. Just. *Wilmot* absent)
Let the POSTEA be delivered to the PLAINTIFF.

Wright, ex dimiss. Plowden Arm. v. Cartwright.

ON a Case stated, from the Assizes.

Edmund Powden being seised in Fee, demised on the 5th of October 1676, by Deed, (*viz.* by Indenture of Lease between Him and *Elizabeth Cartwright, ONLY*,) to the said *Eliz. Cartwright* for 99 Years, if she should so long live; and after her Death, if She happen to die within the said TERM, or other End or Determination of the said TERM, the Remainder *thereof* to Rowland Cartwright her Eldest Son, (then under Age,) *for and during the Residue* of the said TERM, from thence ensuing and fully to be complete and ended: Yielding and paying, &c, and doing Suit at a Mill, &c; with a Penalty for every Time that She or Rowland shall grind at another Mill; and *paying a Heriot* on the Death of Either. And

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* P. 283. * it is covenanted that BOTH of them shall repair &c. And the Lessor on his Part covenants that BOTH shall quietly enjoy &c.

Eliz. Cartwright entred and was possessed; and died on the 4th of September 1694. Whereupon *Rowland Cartwright* entered, and was possessed, till the said *Rowland* died; which happened on 5th November 1753.

The Lessor of the Plaintiff is Heir at Law to *Edmund Plowden*, the Lessor. The Defendant is the personal Representative of *Rowland Cartwright*.

The Question is "Whether the TERM exists:" i. e. Whether it continues BEYOND the Life of *Eliz. Cartwright*. For if the TERM does not continue beyond the Life of *E. C.* then the Lessor of the Plaintiff has a Title to recover: If it does, then the Defendant hath a Title, as Representative of *Rowland Cartwright*.

Mr. *Aston pro Quer'*.

Argued that the Term was expired: It expired on the Death of *Elizabeth*; the Limitation over, being void. And He cited *Tr. 8 Eliz. Dyer 253. b. pl. 102.* which is exactly the same Limitation; viz. "to *W. Cecil pro Termino 12 Annorum, si tam diu vixerit; et si obierit infra prædictum Terminum, tunc &c.*" The Remainders were holden void; because the Term is determinable "upon the Life of *W. C.*" And He also cited *Gro. Eliz. 216. Tr. 32 Eliz. The Case of Green v. Edwards.* That was exactly this Case. It was a Lease to *J. S.* for 90 Years, if he live so long; and if he die within the Term, that then his Wife shall have it, *durante toto resid' Termini prædict'*: It was held void to the Wife; and that She took Nothing. And He said that *1 Co. Rep. 153. b.* Rector of *Chedington's* Case, is express and full to the same Effect; and was agreed *per tot' Cur'*. And that *Co. Litt. 45. b.* is express that "Term" signifies the Estate and Interest that passes; and differs from a Specification of the Number of Years: And says, "So note the Diversity."

All which Cases, He insisted, prove this Limitation to be void.

He cited *Sheppard's Touchstone of Common Assurances 274.* Where it is said, that if a Man makes a Lease to *A.* for 80 Years if he so long live; And if he die within the said Term, or alien, that then his Estate shall cease; and by the same Deed the Lessor farther lets to *B.* for so many Years as shall then remain unexpired after &c, for the Residue of the said Term of 80 Years, if he shall so long live; In this Case the Lease to *B.* "during the Residue of the

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* "TERM," is void: For after the Death of *A*, the TERM is at an * P. 284.
End. But if He say, "for and during the Residue of the 80
YEARS," it is good.

Mr. *Nares contra pro Def.* was beginning to speak—

But LORD MANSFIELD stopped Him; (as not being necessary:)
And He Himself proceeded thus—

LORD MANSFIELD—The Distinction just cited from *Sheppard*,
(which He takes from the Rector of *Chedington's Case*,) makes no
Difference; if the Word "TERM" may signify the *Time*, as well
as the *Interest*: For *then* it becomes merely a Question of Construc-
tion, "*Which Sense the Word ought to be understood-in.*"

So *Anderson* argued, in *Green v. Edwards*: He said, "If the
" Wife had been a Party to the Deed, *Durante termino* should not
" be taken for the *Interest*, but for the *Time*." He said, "The
" Word *Term* cannot be taken to mean the *Interest* which the Hus-
" band had for 90 Years." (For if it is *so* understood, By *his Death*
the Whole would be determined; And the Wife could have No-
thing: And therefore it could not be used in *this* Sense. But the
Lessor, by the Word "*Term*," must mean the *Time* of 90 Years:
And the Word "*Term*" signifies *as well the Time or Space* of 90
Years, as the *Interest*.) The other Judges held the *Limitation by*
way of Remainder to be void, from the *Uncertainty of Commencement*;
And denied that the Wife's being a Party would have made any
Alteration.

The Old Cases held "that there could be *no Remainder* or sub-
stitution of a TERM after an *Estate for Life*, by *Deed* or *Will*."
It was a mere *Possibility*. It was void, from the *Uncertainty of Com-*
mencement. There was *no particular Estate*. The Gift of a Term
(like any other Chattel) for an *Hour*, was good *for ever*.

The Objections were subtle and artificial.

When *long and beneficial Terms* came in Use, the *Convenience of*
Families required that they might be settled upon a Child, *after the*
Death of a Parent. Such Limitations were soon allowed to be crea-
ted by *Will*: And the Old Objections were removed, by changing
the Name, from *Remainders*, to *EXECUTORY Devises*.

The *same Reason* required that such Limitations might be created
by *Deed*: As, for Instance, Marriage-Settlements, to answer the
Agreement of Parties, and Exigencies of Families. Therefore, to
get out of literal Authority of Old Cases, an ingenious Distinction
was

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* P. 285. * was invented: A Remainder might be limited for the Residue of the *Years*; but *not* for the Residue of the *Term*.

Now in *this* Case, upon the true Construction of the Lease, I am clearly of Opinion, "That the Land is demised to the Son *for so* " *many of 99 Years* as should be unexpired at the Death of his " Mother."

There are many Maxims of Law, That Deeds, especially such " as execute mutual Agreements for valuable Consideration, should " be construed *liberally, ut Res magis valeat*, according to the *Intent*:" which ought always to prevail, unless it be contrary to Law.

The Passage from *Coke Littleton* 45. cited by Mr. *Aston*, defines the Word "*Term*" to signify, in Understanding of Law, "*not only* " *the Limits and Limitation of Time*, but also the Estate and Interest " which passes for that Time."

If in *this* Lease, the Word be taken in the *latter* Sense, The Widow can only have it for so many of 99 Years as *She* should live; And the Son have NOTHING afterwards.

But it is manifest that an Interest was understood to *continue after her Death*, to be enjoyed by her Son.

From the Course of Nature, it could not be supposed that *She* would *outlive* the 99 Years. *Rowland* is to pay a Penalty for grinding at another Mill. *He* is to pay a *Heriot* on the Death of his Mother. *He* is to repair. The Lessor covenants "that *Rowland* " *shall quietly enjoy*:" i. e. for so many Years as should not be run, at the Death of his Mother.

The *first* Sense of the Word makes every Thing consistent and effectual: The *second* Sense destroys One Half of the Lease, as repugnant and contradictory to the Other. There ought to be no Doubt, therefore, in *Which* Sense the Word should be understood.

Mr. *Aston* has laid no Stress upon the only Objection which weighed with *Anderson*, so long ago as the 33d of *Elizabeth*: viz. "That *Rowland* was no Party to the Lease:" And rightly. The Reason *why* He was no Party, appears from the Lease: He was then an *Infant*. The Mother contracts, and procures this Limitation for Him. A Grant may be made to a Person, by a Deed to which He is no Party. *Rowland* accepted, and actually enjoyed, after his Mother's Death, from the 4th of *September* 1694, to his own Death, the 5th of *November* 1753. The Lease was so intelligible to every unlearned Eye, that no Body doubted of his Title, for 60 Years.

Limita-

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* *Limitations of Terms* are now of general Use. Their Bounds * P. 286. are settled. The Rules concerning them are certain and established. When they came to be allowed by Will, or by Declaration of Trust, the *substantial Reason* was the same for allowing them by Deed. A strained Construction should not be made, to overturn the *lawful Intent* of the Parties. It was *lawful*, to secure this Lease for the Benefit of the Mother during her Life, and afterwards by way of Provision for her Son. All the Parties undoubtedly *intended* it. The Covenant here, “ that Rowland should enjoy from the “ Death of his Mother, for the Residue of 99 Years,” is sufficiently certain ; and might, of itself amount to a Lease.

Mr. Justice DENISON—This must be taken that She should hold it for so much of the Term of *Years* as she should live ; and Rowland, during the Remainder.

The *Intention* of the Deed is obvious : And it certainly shews, (upon the whole Tenor of it,) that the *Intention* of the Parties was “ that BOTH should enjoy during the whole Term and Number “ of Years.” And if We *can* support the *Intention*, by any Construction, We will do it.

Mr. Just. FOSTER was clear that the INTENTION was that Both should enjoy during the whole *Term and Number of Years* : *Viz.* Elizabeth for so long of it, as She should live ; and Rowland, during the Remainder. All the Circumstances shew this : And the reserving a *Heriot* upon the Death of Rowland proves the *Intention* to have been “ That the *Term* should *continue to Rowland*, after “ the Death of his Mother.” And the Covenants all along run, “ That Rowland shall quietly enjoy.”

Therefore He concurred.

Per Cur. unanimously (Mr. Just. Wilmot absent,)
RULE—That the PLAINTIFF be NONSUITED.

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* P. 287.
Wednesday,
4th May
1757.

* Lant Esq; *vers.* Norris.

P. 29 G. 2. Rot'lo 609.

The COURT full.

THIS was an Action of Covenant, by *Robert Lant Esq;* Son and Heir of *Thomas Lant Esq;* against *William Norris*, Administrator of *John Norris Esq;* his late Father; which *John Norris* was Assignee of *Thomas Wilson*: And it was upon an Indenture of Lease made on 23d January 1707, by the said *Thomas Lant* deceased, who was seised of certain Messuages Ground and Premises (mentioned in the Indenture,) of the One Part, and the said *Thomas Wilson*, on the other Part; whereby, in Consideration of 200*l.* to be laid out in upon or about rebuilding upon the Ground and Premises thereby demised, and other Covenants, the said *Tho. Lant* did demise to the said *Tho. Wilson*, all that Piece of Ground, AND all the Messuages Tenements Houses &c. thereon standing, in *Suffolk Place*, in the Parish of *St. George the Martyr &c.* butted and bounded &c. from *Christmas 1715* for 43 Years at 17*l.* per Annum Rent.

Thomas Wilson, the Lessee, covenants to lay out the said Sum of 200*l.* within 15 Years, in ERECTING and REBUILDING of Messuages or Tenements or some other Buildings, upon the Ground and Premises; And from Time to Time, and at all Times, all and singular the said Messuages or Tenements so TO BE erected, with all such other Houses Edifices &c. as should at any Time or Times THEREAFTER be erected &c. to repair &c: And THE SAID DEMISED PREMISES, with all such other Houses &c. SO WELL REPAIRED &c. at the End or other sooner Determination of the said Term, to deliver up &c.

Wilson entered, *Tho. Lant* died 29th May 1722, seised: And the Reversion descended to *John Lant*, his Son and Heir.

On 24th of March 1738, *Wilson* assigned the Term to *John Norris*: Who entered.

On 24th March 1728, *John Lant* died seised: And the Reversion descended to the Plaintiff, his Brother and Heir.

The Breaches assigned were, first, That after the Term came to *J. Norris*, and after the Plaintiff became seised of the Reversion, and

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* and whilst the said J. N. was possessed, viz. on 1 May 1745, the * P. 288. said J. N. in his Life-time permitted ALL the said demised Messuages to be uncovered &c; by reason whereof the Walls of the same demised Premises were out of Repair; and goes on to other Damages, still calling them (all along) "*the said demised Premises.*" 2dly. That the said J. N. did permit 6 Messuages, Parcel of the said "*demised Premises,*" to be *prostrated*; and to remain so till his Death. 3dly. That the said J. N. on 1st March 1747 did pull down 6 other Messuages then erected and built on the said demised Premises.

Plea as to the 1st Breach, That the said T. Wilson or his Executors did not within 15 Years, or at any other Time lay out 200 l. or any Part thereof, in erecting or rebuilding of any Messuages: And that the said Messuages had never been rebuilt. As to the 2d Breach, the same Plea. As to the 3d Breach, "*Non infregit Conventionem.*" To all the Breaches, the same Plea as above to the 1st and 2d over again, "That T. W. never laid out 200 l." and "That the Messuages never were rebuilt;" and "That J. N. after He became Assignee, and after the Plaintiff became seized of the Reversion, 1st March 1753, died intestate, so possessed; and Administration was granted to the Defendant: By Virtue of which, He entered; And being so possessed, before exhibiting the Plaintiff's Bill, viz. 24th June 1754. assigned the demised Premises to One John Townsend, for the Residue of the Term; who entered, and is possessed."

The Plaintiff demurs generally to the 1st Plea to the 1st Breach, and also to the 1st Plea to the 2d Breach; specially, to the 1st Plea to the 3d Breach; generally, to the 2d Plea to the 3d Breach; and generally, to the last Plea to all the Breaches. There was also a Plea of *Non prostravit*: And a Demurrer to it.

The Defendant joins in Demurrer, to all the Demurrers.

Mr. Wynn, for the Plaintiff, urged that the Pleas were no Answer; and that they neither confessed nor avoided the Charge in the Declaration, nor denied it.

Mr. Gould *contra*—for the Defendant, gave up the Pleas: But He objected to the Declaration, viz. That the Intention of the Parties was to confine the Repairs to the Buildings *thereafter* TO BE erected: as it appears that there were No Buildings (of any Consideration) upon the Land, at the Time of the Lease; nor is there any Averment in the Declaration "That the Lessee" (Wilson) "*ever did erect any such.*" Which Averment ought to have been made, in order to have maintained this Action: For, without such Erection, the Defendant

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* P. 289. * fendant *could not be obliged* to repair. And a Plaintiff must shew every thing in his Declaration, that is necessary to maintain his Action.

The Words “the *said demised Premises*” must relate to those in the beginning of the Covenant; and therefore only mean and intend “That he should leave *them*, viz. the new erected and re-built Edifices, in Repair, at the *End* of the Lease.

The Covenant is *future*: And the Lessor could not have any Action upon it, *till* the *End* of the Term.

It appears by 5 *Rep.* 21. *a.* Sir *Anthony Main's* Case, that if a Man lets a Manor for Years; and the Lessee covenants to keep the Houses of the Manor and whatsoever was within the Manor, in as good Estate as he found them, during the Term; And the Lessee makes Waste in the *Houses*, and in cutting *Oaks*; the Lessor may bring an Action of Covenant, before the End of the Term, for the *Oaks*; For, *for them*, it was impossible that the Covenant could be performed: But 'tis otherwise, of the *Houses*.

And with this agrees *Fitzh. Nat. Brev.* 8vo. Edition, 324. Letter I. the same Law. Though if he fells Timber, &c. [if he do Waste in Wood] he may have an Action of Covenant DURING the Term: “For *that* (says the Book) cannot be repaired.”

He likewise cited 1 *Salk.* 199. The Case of *Grescot v. Green*, Where the Lessee covenanted for him and his Assigns, to rebuild and finish a House *within such a Time*; And *after* the Time expired, the Lessee assigned over the Premises, the House *not* being then built and finished according to the Covenant: And *per Holt* Ch. Just. This Covenant shall not bind the Assignee; because it was *broken before the Assignment*. *Aliter*, if broken *after* the Assignment: As if the Lessee had assigned *before* the Time had been expired. Which Case was cited to prove “that the Action did not lie in the present Case; *because* the Assignment was made *after* the 15 Years were expired.”

Mr. *Wynn*—The Record is now to be considered as upon a General Demurrer to the whole Declaration: And I shall rely on the 1st and 2d Breaches, and not on the 3d, (which has I own, received a proper Answer, by Issue being offered.)

Covenants are to be construed for the Benefit of the *Covenantee*; not of the *Covenanter*.

These

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* These are Buildings demised; And 200*l.* is agreed to be laid * P. 290.
out in Repair of *them*, OR in erecting *New Ones*: Then there is a
Covenant “to repair the Buildings *to be* erected on the demised
“ Premises; and the SAID DEMISED PREMISES, *and others* so
“ to be erected, so being well and sufficiently repaired &c, to
“ leave &c.”

This intimates that the *demised* Buildings, *as well* as the New
Erections, were to be kept in Repair. Here is sufficient, from
whence to collect the Intention and Meaning of the Parties, to be
so: Which will amount to a Covenant. And upon this General
Demurrer, the Court will not intend that the 200*l.* was laid out
only on the *other* Buildings newly to be erected.

LORD MANSFIELD—

I choose to look into it, and consider it a little. No particular
technical Words are requisite towards making a *Covenant*.

Mr. JUST. DENISON—The Question only is Whether the Words
“*demised Premises*,” are omitted, by Mistake, in the former Part
of the Covenant; or superadded, by Mistake, in the latter: For
there appears to be a Mistake in either One or the Other, in the
Deed itself. The Lease is a Building-Lease.

Now the Premises *then standing* were to be *pulled down*. There-
fore it could scarce be intended to covenant to repair *them*. The
Covenant “to repair,” is confined to the Tenements *to be* erected:
The Covenant “to leave in Repair” extends to the *demised* Premises,
together with all such Other as shall be thereafter erected.

Mr. JUST. FOSTER—’Tis a Building *and* Repairing Lease.

In order to look into the Lease, it stood over, with a
CURIA ADVISARE VULT.

And now, (having considered it till the next Day only,) LORD
MANSFIELD said, WE are extremely clear, That not only the
Words of the Covenant, but also the *Intent* of the Parties, mani-
festly shew that it was *not* meant that any of the Money should be
laid out on the *Old* Buildings: But that *they* were to be pulled
down; and that whatever he SHOULD *erect*, with the 200*l.* or
otherwise, for his own Convenience, should be kept in Repair.

The Words “*demised Premises*” are put in *Opposition* to the
Buildings that were TO BE *erected* thereupon with the 200*l.*

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* P. 291. * And the Covenant "to deliver up," is agreeable to this Construction: That Covenant being, to leave "the demised Premises, together with all such other Houses &c, as *should be afterwards erected* &c, so well repaired."

It is therefore clear against the Plaintiff, upon the 1st and 2d Breach: And Mr. *Wynn* acknowledges it to be against Him on the *third*.

Therefore the COURT gave
JUDGMENT for the DEFENDANT.

Wednesday,
4th May
1757.

Frazer's Case.

The COURT was full.

THIS *Frazer*, being an Attorney of this Court, had taken for his *Article-Clerk*, One *Smith*, a *Turn-key* of the King's Bench Prison; a full-aged Man, and who still continued to act as *Turn-key*. It did not appear that any Money was paid; or that the Master fed lodged or entertained the Clerk, (though the Articles indeed covenanted "that he should:") Nor did the Clerk officiate for *Frazer*, but in Matters relating to the Prison. It appeared that *Frazer* had, since these Articles, (which were dated only two Years ago, in 1755) become concerned in 63 Causes, on Behalf of the Prisoners in the Gaol.

This whole Matter being disclosed to the Court, upon the Application of Mr. *Moss*, the Clerk of the Papers of the Prison,

The COURT were *All* very clear that these Articles were *merely collusive*, that the Whole was a *Contrivance* between *Frazer* and the *Turn-key*, to secure the Business arising from the Prisoners; that the Exercise of the Office of a *Turn-key in a Prison* was, both in itself, and also according to the Intent and Spirit of the Act for regulating Attornies, a very improper Education for the Profession of an Attorney; And that these Articles ought to be *cancelled*.

And accordingly, they were, by the express Order of the Court,

CANCELLED in Court (by Master *Clark*) and directed to be kept in Court, and not delivered back.

Peirce

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* Peirse Esq; *vers.* Lord Fauconberg.

(*Lord Commissioner Wilmot absent, in Chancery.*)

* P. 292.

Saturday,
7th May
1757.

THIS was a Trial at Bar, on the Civil Side of the Court, by a Special Jury of the County of York.

The Question was concerning a Right to track or tow Vessels, upon the Banks of the River Tees (which divides Yorkshire from the County-Palatine of Durham) from Yarm-Bridge up to Low Worfall.

There had been a former Issue tried, "Whether the River Tees" was a *navigable* River, from Yarm-Bridge to Low Worfall:" Which Issue had been found in the Affirmative.

And the present Trial was a new Trial (a second new Trial indeed) directed by the Court of Chancery, upon an Issue "Whether the * Plaintiff had a Right to a Track-path on each Side of the River (alternatively according to the Course of its Banks) for the Convenience of Towing; without Let or Hindrance from, or paying any Acknowledgement to the respective Owners of the Soil,"

The Trial lasted till about Two o'Clock on Sunday Morning: At which Time, the Jury (after staying out about Quarter of an Hour) brought in a Verdict,

For the PLAINTIFF.

Rex *vers.* Roger Philips, Mayor of Carmarthen

Monday, 9th
May 1757.

(*Lord Commissioner Wilmot absent, in Chancery.*)

THE Defendant had pleaded to an Information in Nature of a *Quo Warranto* exhibited against him, "to shew by what Authority he acted as a Mayor of this Borough," a Title of Election and Swearing under a MANDAMUS pursuant to 11 G. 1. c. 4.

* N. B. The Plaintiff did not claim this, as a *distinct peculiar* Right of his own; but as a *general* Right claimable by all Persons whose Occasions led them to navigate this River.

But

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* P. 299. * But the *Swearing* was (by Mistake) set forth to have been in the same Manner as it ought to have been in Case the Election had been upon the CHARTER-Day.

Upon the Replication, no less than 14 Issues were joined: Which went down to be tried before Ld. Ch. Baron *Parker*, as Judge of *Nisi prius*. But one of the Issues (the 9th) was taken upon the *Swearing* thus (erroneously) alledged to be before such Persons as were only proper to preside UPON the CHARTER-DAY; (*just as if it had in fact been an Election under THE CHARTER* :) Which was a mere *Mistake* in the Defendant's Plea; For his REAL *Swearing* in Fact was *right*, viz. AGREEABLE TO the DIRECTIONS of 11 G. 1. concerning the Manner of being sworn under and pursuant to a Writ of *Mandamus*. The Plea was worded thus, as to his being sworn in; viz. " That after the Defendant had been so elected and
" chosen to be Mayor, &c; and before He took upon himself to
" execute the said Office; to wit, at that SAME Meeting and As-
" sembly so holden upon the said Friday the said 30th Day of May
" in the 28th Year aforesaid in Manner aforesaid, He the said Roger
" Phillips, IMMEDIATELY after his said Election, did then and
" there ACCORDING TO the DIRECTIONS of the LETTERS
" PATENT of the said late King Henry the 8th TAKE his Cor-
" poral Oath, upon the Holy Evangelists of God, BEFORE John
" Evans Merchant, George Jenkins, Daniel James, William Sears,
" Lazarus Thomas, Samuel Morgan, John Evans Carpenter, John
" Evens Currier, Richard Leigh, George Bayle, Thomas Richard,
" and Lewis Philipp, then and there being TWELVE discreet and
" honest Men of the BURGESSES of the said County-Burrough,
" rightly well and faithfully to execute the said Office of Mayor
" of the said County-Burrough, in all Things touching and con-
" cerning the said Office; They the said John Evans Merchant,
" G. J. D. J. W. S. L. T. S. M. J. E. C. J. E. C. R. L. G. B.
" T. R. and L. P. then being TWELVE discreet and honest Men of
" the BURGESSES of the said County-Burrough then and there
" APPOINTED ACCORDING to the DIRECTIONS of the said LET-
" TERS PATENT last before mentioned, by the said then Com-
" mon Council of the said County-Burrough BEFORE WHOM
" the said Roger Philips, so elected and chosen Mayor of the said
" County-Burrough as aforesaid, WAS to TAKE his said OATH :
" And that He the said Roger Philips was THEREUPON, then and
" there, in due manner, admitted into the said Office of Mayor of
" the said County-Burrough. BY VIRTUE WHEREOF He the
" said Roger Philips, on the same Friday the said 30th Day of May
" in the 28th Year aforesaid and from thence continually after-
" wards, for, &c, was Mayor &c. And by THAT Warrant, He
" the said Roger Philips, on, &c, and from, &c, until, &c, did
" there

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“ * there use and exercise the said Office of Mayor, &c ; And for * P. 294.
“ and during all the said Time, did there Claim, &c.”

The *Lord Chief Baron*, who tried the Cause, reported that He was of Opinion, upon the Trial, “That upon the 9th Issue, the Defendant *could not give Evidence* of a *different Swearing* from what He had *alleged upon the Record* ;” And “That upon the 10th Issue” (taken upon the Allegation of being *by Virtue thereof Mayor, &c.*) “He *could not vary from the Title before set out*, by Virtue whereof He *claimed to be Mayor*.” And He had directed the Jury to find for the King: And they found a Verdict accordingly. And he also reported “That no Evidence was entered into, upon *any* of the Issues ; And that Verdicts were found for the *King upon all* of them: But that this was *agreed to be without Prejudice* in any *future Trial*.”

Mr. *Norton*, Mr. *Morton*, and Mr. *Price*—for the Defendant had thereupon moved for and obtained a Rule for the Prosecutors (who had thus gotten a Verdict,) to shew Cause “why there should not be a *new Trial* ;” upon an Insinuation “that the Judge who tried the Cause, had *misdirected* the Jury :” Which *Misdirection* consisted, as they alleged, in this, *viz.* “That the Judge had precluded the Defendant from giving any Evidence to prove his Swearing, as *set forth* in the said 9th Issue ; the Judge apprehending and so directing the Jury, that it could be of *no Kind of Service to the Defendant*, to be admitted to prove an Issue, which IF *proved or even admitted*, could NOT *at all tend to make out his Right* ; For that if this Swearing as UNDER a CHARTER-Election were to be *admitted*, yet still it would not appear in ANY Part of the Record, that He was *regularly sworn UNDER a MANDAMUS-Election* ; Which was the *Species of Election* under which he *claimed*.”

Sir *Richard Lloyd*, Mr. Serjeant *Poole*, and Mr. *Aston* were prepared, as they said, to shew Cause, by convincing the Court “that the Direction of the Judge was RIGHT ; and consequently, that the Verdict ought to stand.”

LORD MANSFIELD—The Direction of the Judge was certainly right. Therefore, if You should prevail in this Application for a new Trial, it could be of no Service: For, as *the Record stands*, the *same* Direction must be given again.

Yet I am very desirous to cure this Slip, if possible: For the *Merits* have *never been tried*.

Consider whether the Verdict may not be set aside ; And the Parties admitted to *plead AGAIN*.

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* P. 295. * The RULE WAS ENLARGED; with this *Addition*, viz. to shew Cause “why the Verdict should not be set aside, AND a Re-pleader awarded.”

Mr. Serjeant *Poole*, for the Prosecutor, now shewed Cause against setting aside the Verdict and awarding a Repleader. And He alledged that, though there should be a Repleader awarded, yet the *whole Record* must nevertheless stand as it is at present.

As to Repleaders in General—He cited 6 *Mod.* 1. The Case of *Staple v. Haydon*—(1st. Resolution:) It can only be on such an impertinent Issue, as the Court can give *no* Judgment upon.

Mr. *Norton*, Mr. *Morton*, and Mr. *Price*—*contra*—for the Defendant—The Issues are not all found against us, *absolutely*; but *without Prejudice* to any future Dispute, except as to the 10th Issue.

Mr. *Norton*, Mr. *Morton*, and Mr. *Price* stated the Mistake: Which they said was thus; viz. The Defence set up was “An Election of the Defendant under a *Mandamus*, issued pursuant to 11 G. 1.” And in setting out his Oath of Office, he avers it to have been DULY taken; and shews it to be an *Oath*, taken by him upon this Election, and sets out the right and proper Oath of Office; but the Plea, 'tis true, goes on, (following, by Mistake, a precedent of a Plea of an Oath of Office taken under an Election upon the proper Charter-Day,) and alledges it to be a Swearing at the same Meeting so holden, &c, BEFORE Persons who were only proper to preside upon the CHARTER-Day; viz. (BEFORE 12 Burgeffes, &c.)

Which Swearing before these improper Persons, they urged to be totally immaterial; And that, for the Sake of attaining Justice, it ought to be some how or other, set right; the TRUE Question having never been tried, viz. “Whether He took the Oath of Office, agreeably to the DIRECTIONS OF 11 G. 1.”

Therefore it shall either be amended, OR a Repleader awarded: For upon the present Record, there is no Justification at all; And therefore the Issue joined is totally immaterial. The Case of *Staple v. Haydon*, 6 *Mod.* 1. is almost in Point. 1 *Ld. Raym.* 707. S. C. [1 *Salk.* 173, 216. S. C.]

This is a good Plea in Substance; but ill pleaded in Point of Form.

They ought to have DEMURRED to this Part of the Plea; and not to have taken Issue upon it: For it is a Matter of Law, “Whether
“ther

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* “ ther the taking *this* Oath would have justified the Defendant.” * P. 296.
And a Verdict cannot make that good, which the Court fees cannot be so in Law. Therefore this Verdict is utterly *void*: Just like that in *Hobart* 112. *Tasker v. Salter*.

And such Repleaders, in Informations, are no Novelties. For in 1 *Ventris* 122. the Case of * *Reynell v. Heale*; a Repleader was awarded, because the Issue was mis-joined.

And they *offered to pay Costs*, in order to have this Matter set right: And insisted that this is but just and reasonable; especially, as many *other* Persons Rights depend upon the Right of this Mayor.

They also cited *Cro. Eliz.* 245. the Case of *Love v. Wotton*—Where a Repleader was awarded after Verdict; the Defendant having mispleaded the Statute. The Reason of awarding the Repleader there, must be, “ because the *true Merits* had *never been tried*.”

They even urged farther, that it might well be taken, upon the Face of the Record, “ that he *was* sworn before the *proper* Persons:” it being alledged “ that it was at the *SAME* Meeting then and “ there so holden.”

But they insisted that at most, this is *only Form*.

As to Repleaders in general—They cited 1 Sir *J. S.* 394. The Case of *Rex v. Philips* Mayor of *Bodmyn*; Where the Defendant's Title was *clearly defective*, and confessed an Usurpation; And therefore, as the *Merits appeared* to be against the Defendant, the Repleader was not indeed there granted: But the general Position seems to be, “ that it *might, otherwise*, have been granted.”

Mr. Serjeant *Poole*, Sir *Richard Lloyd*, Mr. *Aston*, and Mr. *Nares pro Rege*—argued that it is needless to grant a Repleader, where there is *sufficient* appearing upon the Record, whereupon to give Judgment *against* the Party, *exclusive* of the Part which is pretended to be immaterial.

Nor shall a Repleader be awarded, where the Defendant has set forth a *defective Title*.

* *N. B.* This was a *Qui tam* Information, at least; if not a *Qui tam Action*: The Book is inconsistent with itself; but the Title of the Cause shews that it was an *Action*.

Now,

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* P. 297. * Now, certainly, this is a *defective Title*: He appears to be sworn before *improper* Persons; And does *not at all* appear to *have been* ever sworn before the *proper* Ones.

This is *not* a mere *defective* MANNER OF PLEADING; like *Cro. Jac.* 434. the Case of *Holms v. Broket*—where Issue was joined on a Plea of Payment *before* the Day; or *Hob.* 112. the Case of *Tafker v. Salter*; where the Issue (upon *the Way*) was in Effect no Issue at all.

But this is absolutely a *defective* TITLE; a Swearing before improper Persons; And is like 6 *Mod.* 1. the Case of *Staple v. Haydon*. And they cited *Cro. Eliz.* 214. the Case of *Lacy v. Reynolds*; where though the Issue was immaterial, yet, the plea confessing the Words, the Court gave Judgment as upon a Confession. So, *Carthew* 371. The Case of *Jones v. Bodinner*; and 1 *Salk.* 173. S. C. a like Resolution. So, 1 *Ld. Raym.* 390. the Case of *Pitts v. Polehampton*.

But if a Repleader should be granted as to THIS Issue, yet *enough* (besides this) will stand upon this Record to intitle us to Judgment for the King.

Repleaders are never awarded for the Sake of the *Parties*; but for the *Sake of the* COURT.

And this is the Reason why there are *no Costs* upon Repleaders: As appears by 2 *Salk.*—Title Repleader. p. 579. [Which is an Abridgment of the Case of *Staple v. Haydon* in 6 *Mod.* 1. and 1 *Ld. Raym.* 707.]

Nor shall Repleaders ever be awarded, where *sufficient* appears upon the Record, whereupon the Court can give Judgment. They shall not be awarded, ONLY *because* the Party has MISTAKEN *his* Case: They shall never be awarded, but where the Issue is so immaterial that the Court cannot tell how to give Judgment. In the Case of *Serjeant v. Fairfax* in 1 *Lev.* 32. it is laid down by *Twyfden*, and agreed by the Ch. Justice and *Wyndham*, That “An immaterial Issue is, where, upon the Verdict, the Court can not know for whom to give Judgment; whether for the Plaintiff, or for the Defendant,”

It depends upon the Plea pleaded; not upon the real Merits: For though the Issue be *improper*, yet Judgment shall be given; as is expressly laid down in the same Case of *Serjeant v. Fairfax*—1 *Lev.* 32. “If an IMPROPER Issue is taken, and Verdict given thereon; Judgment shall be given thereupon; be it for the Plaintiff, or for the Defendant.” *Cro. Jac.* 288, the Case of *Tampion v. New-*

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* *Jon and Bridget his Wife*: The Plea of the Feme, without the Baron was no Plea at all, nor confessed any Thing. In *Bro. Repleader* 55. It did not appear how much the Executors had; who pleaded "*riens inter maines*," which was found against them. *Cro. Eliz.* 245. The Case of *Love v. Wotton*, (where the Statute of Usury was misrecited,) was a Case where *no judgment could be given*: For the Court were *bound* to know the Statute; and that there was no such Statute as was pleaded, which was a Statute made the *sixth* of February. * P. 298.

In the present Case here is NO FAULT *in the Pleadings*. Therefore where shall the Repleader begin? This Case is NOT *the Subject-Matter of a Repleader*: This is *only a DEFECTIVE TITLE*.

It would be an ERROR, to grant a Repleader, where the Court can give Judgment *upon the Pleadings already* before them.

Now here, the Defendant who claims to be Mayor has NOT *shewn* "That he WAS *sworn* before the *proper Persons*:" And the Court cannot *presume* it. He is asked "*Quo Warranto*" he acted as Mayor: And his Defence is *this*, "by a proper Election and (*improper*) Swearing;" And that "*eo Warranto*," he acted as Mayor. But this plainly appears to the Court to be NO Warrant at all. Therefore the Court must give Judgment *against* him.

And the Chief Baron certainly determined right: For a Man cannot plead *One Case*, and then prove *Another*.

Hob. 112. The Case of *Tasfer v. Salter* is not like this Case. *This is a Fact*; on which the Jury *have* judged.

And surely it does not follow, nor can it be taken upon the Face of this Record, that because he was sworn *at THAT ASSEMBLY*, He must therefore be sworn before the *proper PERSONS*.

On the contrary, it is most manifest that He has *not* set out a *complete Title* to exercise the Franchise: And therefore the Court must give Judgment against him.

The *other Issues* were *never proved*: And even this bad Title, set up by this Issue, is found *false*; viz. "That He was NOT so *sworn* in, as he has pleaded."

Judgment shall be given against the Defendant, even upon an Issue misjoined, *if found FOR the Plaintiff*. *Cro. Eliz.* 778. The Case of *Dighton v. Bartholomew*. 5 *Co. Rep.* 43. *Nichol's Case*. *Cro. Jac.* 377. The Case of *Edward Maria Wingfield v. Bell*. 2 *H.* 7. 11. *b.* *Rex v. Herle*. Which Case proves that if a

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* P. 299. * Man sets up a Right, *different* from his Title, it shall be against him; And he shall *not* set up *another* Title, *afterwards*.

The Court may here give Judgment as upon a confession, when the Issue is immaterial, and the Mistake not amendable: And there shall in such Case, be no Repleader. *Cartbaw* 371. The Case of *Jones v. Bodinner*, expressly. 5 *Mod.* 226, 227. S. C. *Cro. Jac.* 678. The Case of *Johns v. Ridler*: Where though the Issue was immaterial, yet being found *for the Plaintiff*, it was adjudged for him, upon the Defendant's confessing the Ejecting.

In the Case of *Love v. Wotton*, *Cro. Eliz.* 245. the Court *could not* give a complete Judgment.

Cro. Car. 25. The Case of *Knight v. Harvy* Administrator of *Harvey*, *M. 1 C. 1.* (where the Defendant pleaded an impossible Judgment, and *riens en ses maines*, but only to satisfy it; and the Plaintiff replying, the Issue was found for the Plaintiff, and He had Judgment;) is a Case parallel to the present: For as the Judgment there pleaded was a bad Judgment, so this is certainly a *BAD Swearing in*. Therefore the Court will here give Judgment upon the *Information*; as they did upon the Plaintiff's Declaration there, notwithstanding that impossible Issue being found, it being found for the Plaintiff.

Here, *Both* the Election AND Swearing in, ought to have been well pleaded: Neither is a Defence, of it self alone.

And the Court cannot take Notice of the *Fact*, *otherwise than* as it has been *pleaded*.

Therefore Judgment may be given, as upon a Confession, in the present Case: For the Defendant *shews no Right at all*, to act as Mayor.

So that, upon the Whole, Judgment ought to be entered for the King, *upon the Face* of this Record. To prove which, they cited 2 *Strange* 873. The Case of *Broome v. Rice & al* in *C. B.* as in Point: Where, though the Justification confessed the Cause of Action, in Effect, yet the Plaintiff replying "*de injuria sua propria absq; tali Causa*," Issue was thereon joined, and found for the Defendant; But the Verdict was set aside; and Judgment ordered to be entered for the Plaintiff, and a Writ of Inquiry of Damages to issue.

Mr. Norton in Reply—

The SUBSTANTIAL Part of this Plea, is the "*being sworn at this Assembly, immediately after the Election:*" And the PERSONS
2 "before

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“ * *before whom* the Swearing is alledged to have been,” may be con- * P. 300.
sidered as *Surplusage*. If *so*, We ought to have been let in, at
Nisi prius, to prove our Plea: If it is *not so* to be taken, We
ought now to be let in, either to *amend*, or to *replead*.

This would plainly be a *good Bar*, IF *well pleaded*. Therefore
the Court will, for the sake of Justice, grant a Repleader.

The Title set up by the Defendant, is an *Election under a Man-
damus*; and the Defendant has accordingly stated an Election made
pursuant to the Directions of the 11 G. 1. and a Swearing in, *pur-
suant to it*: But He goes on, and particularly shews a Swearing in
before 12 *Burgeses*, the CHARTER-Officers, (which should have
been alledged to be before “The Persons directed by the 11 G. 1.
viz. the then *presiding Officer* ;”) And this, upon Issue taken there-
on, is found *against* him. Now surely this has *not* tried the ME-
RITS: This Issue was *quite immaterial*. And therefore there shall
be a Repleader: And this must be a Repleader of our *whole entire*
Title.

But they say that “this is a DEFECTIVE Title; not a mere *im-
proper* Title: And that therefore Judgment shall be given against
“the Defendant.”

Now this is *not* the Rule of Repleaders. Indeed if the Bar be
evidently NOT a *good Justification*, it is idle to grant a Repleader:
But *otherwise*, a Repleader shall be awarded. In *Cro. Jac.* 5. The
Case of *Coxe v. Cropwell*, The Husband pleaded “Not guilty,”
when no Tort was supposed in him; So that this was a Case where
the real Question had not been tried: And *therefore* the Court
granted a Repleader.

And the Party who makes the first Fault, may, notwithstanding
that, pray a Repleader.

Wherever the Court see, upon the whole Record, that the Issue
joined will *not try the true Question*, the Court will grant a Re-
pleader.

The Case of *Serjeant v. Fairfax*, 1 *Lev.* 32. *P.* 13 *C.* 2. *B. R.*
is strongly for Us. It was a *bad Plea*; it proceeded originally from
the Defendant; an immaterial Issue was joined; and a Verdict
was * *against him*: And yet a Repleader was awarded; BECAUSE
the Merits HAD NOT been determined, and the Court could not
therefore know *for whom* to give Judgment.

* No: The
Verdict was
for the De-
fendant; and
the Plaintiff

moved for a Repleader. Indeed Twisden said that it was the same Thing, “be the Verdict for the
“Plaintiff, or for the Defendant.”

But

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* P. 301. * But they say that "Here is *sufficient* for the Court to give
" Judgment upon."

I answer, that these are not to be taken as *independant unconnected* Issues; but as One ENTIRE TITLE, though consisting indeed of various distinct *Parts*. And he said He could see no Reason for the Crown's taking such a Number of Issues, upon these *Quo Warranto* Informations: Indeed perhaps the single Issue of "Not Mayor," would take in the Whole.

LORD MANSFIELD—

General Rules, are wisely established, for attaining Justice with Ease, Certainty, and Dispatch.

But the Great End of them being "*to do Justice*," the Court are to see that it be *really* attained.

In order to discover what was just upon the present Occasion, He said He would consider this Case in two Views; *viz.*

1st. Upon the mere Foot of the *Swearing*, as it is here pleaded and put in Issue; and

2dly. What Alteration is made by the *other* Issues, and the *Verdicts* upon them, found in the Manner as they have here been.

First—If *this* Issue upon this Swearing-in, had stood alone, this had been an *immaterial and void* Issue; as it tends to *prove Nothing*, either for the Crown, or for the Defendant; And from which, *No Conclusion* can be drawn, *either Way*.

It appears too, upon the Record, that this MIGHT *have been* so pleaded, *as* to have shewn whether He had, or had not a Right: (Supposing the Question to be *confined* to this single Issue.)

What is the Rule of Law then, as to such an *immaterial* Issue joined, and *Verdict* upon it?

It is, "That when the finding upon it does NOT *determine the Right*, the Court *ought* to award a Repleader: *Unless* it appears from the whole Record, that no *Manner of Pleading* the Matter, *COULD have availed*."

The principal Cases to prove this are (amongst many others to the same Effect.)

6 Mod.

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* 6 Mod. 2. The Case of *Staple v. Haydon*, [1st Resolution;] * P. 302. where the Court held "That a Repleader is to be awarded, when "*such* an Issue is joined, as the Court, after Trial thereof, cannot "give a Judgment; as being impertinent, And NOT *determining* "the Right:" (I lay the Stress on these Words, "And NOT *determining* the Right.")

Moore 867. The Case of *Tasler v. Salter*, [S. C. with *Hobart* 112.] The Verdict passed upon a void Issue: And the Court awarded a Repleader. It was as no Issue at all, and impertinent, as pleaded.

Here, it MIGHT *have been* pleaded *right*: But *as* there pleaded, it did not conclude; And therefore the Court could not determine the Right.

So the Case in *Cro. Eliz.* 245, *Love v. Wotton*, (A Plea of the Statute of Usury, upon the usurious Bond—) There, as the Statute was pleaded, The Conclusion "that the Obligation was taken "by Usury &c," was immaterial: But the Statute *might* have been pleaded right; and then it would have been a good Defence. And *therefore* the Court awarded a Repleader.

But there is a later Case, (And the Courts have been more liberal of late Years, in their Determinations, and have more endeavoured to attend to the *real Justice* of the Case, than formerly;) And this is the Case of *Tryon v. Carter*, M. 8 G. 2. which is reported in 2 *Strange* 994. and is a very material Case: "A Bond Conditioned for Payment of Money *on, or before* 5th December. Plea "of Payment *on* 5th December; Replication, Issue, and Verdict "for the Plaintiff." This was holden to be an immaterial Issue; and a Repleader was therefore awarded: Though it would have been conclusive, if found for the Defendant; but did not conclude, when found for the Plaintiff. Therefore, (though that was a Slip of the Defendant) as it did not determine the Question, a Repleader was awarded.

The Case that has been mentioned, of *Rex v. Philips*, M. 7 G. 1. in 1 *Strange* 394. is material, for the Reason given by Ld. Ch. J. *Pratt*. For if the Justification is such in Point of Matter and Substance, as could not, if put into *any* Form of Words, be material with regard to the Defendant by Way of Defence, it is in vain to grant a Repleader; It being to no Purpose to do so, where the *Case itself cannot be amended*, or would be at all material, if put in *any* Shape whatsoever: Which was that Case; For it amounted to a Confession of the Usurpation, as was there holden. And if it did, then he very

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* P. 303. * rightly said “ that if the Court should grant a Repleader, the Defendant *could not mend* his Case: For the Plea would stand; And “ after the Formality of a Demurrer, the Court must give Judgment upon the Goodness or Badness of it.” And Ld. Ch. Just. Pratt went on, and compared it to an ill Justification in Trespass, (where *no* Form of Words would have made it a Defence;) And therefore was of Opinion that as the Plea was ill, and contained no Title to the Franchise, the Court might give Judgment upon it, as confessing an Usurpation. [*V. 1 Strange 398.*]

Now *here*, supposing (as I said before) the Swearing to be the *only* Issue; is it not a Question totally *inconclusive*, “ whether he was, “ or was not, sworn before *THESE Persons?*” Does it at all *conclude* to the real QUESTION? Is not this, manifestly, a *Slip*? Does it not *appear* that this Plea * *COULD have been mended?* Certainly, it *COULD*; viz. by Pleading the Swearing-in, to have been agreeable to the Statute of 11 G. 1. [*c. 4. § 4*, which directs it to be before the presiding Officer.] Therefore, the REAL *Justice* of the Case is, That this *Slip* should *not* be fatal for ever.

* N. B. This Plea seems to have been good in Form; but insufficient, as to Fact. See Fortescue's Distinction in 1 Strange 398.

This is a Franchise of great Importance. It is so, in *itself*: And, besides, the Rights and Privileges of *many other* Persons do depend upon it. And these Writs of *Mandamus* issuing pursuant to this Act were intended for the *settling* and *preserving* of Corporations.

If this was the *single* Issue, I think they would be *clearly intitled*, in this Case, to a *Repleader*. Yet

Secondly—It is objected “ that here are *many other Issues*, all “ *found for the Crown*, as well as this.”

But the Issue just now spoken of as immaterial and void is, an Issue taken upon an Essential Part of an *entire* Defence: For the Defence here pleaded by the Defendant is *One entire* Defence; notwithstanding that the Crown is at Liberty to take distinct Issues upon the distinct *Parts* of it. And therefore it would be absurd and inconsistent, that the Finding against the Defendant upon the *other* Issues, the other *Parts* of *One entire* Defence, should stand; in case we should grant a Repleader upon, or an Amendment of *this* Part: For, if that should be permitted, the Finding would still be *against* the Title of the Defendant, it being set up and pleaded as *One entire* Title.

I agree that if it appeared upon the whole Record, “ that the “ Defendant was *NOT* duly elected,” it would be as Ld. Ch. Just. Pratt says, a vain and idle Thing, to grant a Repleader.

But

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But if the rest of Issues are only *Parts* of, and *dependant* upon * P. 304. the **WHOLE TITLE**; the same Reason does not then hold.

The Way to do *complete* Justice indeed, is to let in the *one* Side, without prejudicing the *other*.

If a *Repleader* was to be granted, (upon the Supposition of this being the *only* Issue,) it must be * **WITHOUT Costs**. But as this was ^{* V. 6 Mod. 2. 5th Point.} a *Mistake* of the *Defendant*; (in which the *Prosecutor* was *not* to blame,) We ought to do the most complete Justice We can, between Both.

My Ld. Ch. Baron was right in his Opinion, “ that He could “ not admit Proof *different* from the Issue joined;” And also “ that “ this Issue was *connected* with the others.”

If so, the Verdicts were *without Evidence*: And it was agreed “ that they were to be *without PREJUDICE*.” Therefore such Verdicts ought to be set aside, *as* without Evidence; and not to conclude against the Defendant, which *would be* a *Prejudice*.

Therefore He proposed to set aside these whole Verdicts, on *Payment of Costs*; and to give the Defendant Leave to *amend* his Plea.

If it had been upon a *Demurrer* (which there might have been) the Court *would have given Leave to AMEND*.

This seems to be the true Way to come at Justice; and what We therefore ought to do: For the true Text is “ *boni Judicis est, “ ampliare JUSTITIAM*,” (not “ *jurisdictionem*,” as it has been often cited.)

This is what I would *wish* to do, if We *can* do it.

Mr. Just. DENISON—

Formerly, Verdicts were not used to be set aside: And therefore, at that Time, Repleaders used very commonly to be granted. But they have been less usual of late, since the Practice of setting aside Verdicts has prevailed.

On Repleaders, the Issue was considered as void; and the Verdict too; And consequently, the Judgment was, “ to *replead*.”

An Information in Nature of a *Quo Warranto* does not differ from *other Cases*.

Here

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* P. 305. * Here is an *entire Plea*: The Replication *separates* it, and takes Issue on different *Parts* of it. The Replication *ought* to have *demurred* to this *immaterial* Part of the Plea: But *Issue* is joined upon it; And there is a Verdict upon it in the Negative, *viz.* “ That “ the Defendant was *not* so sworn as he has pleaded.” What can the *Court* do? The Issue and Verdict are *impertinent* and *void*. How then can the Court give *Judgment*, when it *does not appear* whether the Defendant had a Right, OR NOT? (I speak now upon this single Issue *only*.)

Well then, If you set aside any *Part* of the Verdict, You must set aside the *Whole*.

And this used, formerly, to be *one* Issue.

I well remember that Case of *Rex v. Philips*, M. 7 G. 1. It went upon an Usage to hold over. The Point was Whether a Repleader should be granted, when the Case could not be varied: And it was holden, that that would have been vain and idle. On the contrary, it was said that it would be a different Thing, if the Case could have been *mended* upon a Repleader. I don't doubt but that there were great Numbers of *other* Issues in that Case, as well as in this: And yet a Repleader *would have been there granted* if the Case could have been *mended*, on the Usage.

The *Whole* must be set aside, *if Part* is set aside.

It is said “ that this is a DEFECTIVE *Title*.

But it is NO *Title at all*: It is *only one Link* of the whole Chain.

I think We may set aside the *whole* Verdict upon *one* of the Issues being void. And this is better than granting a *Repleader*: Upon which a Writ of Error may be brought, and may long depend; which will be a much greater Delay of Justice.

Mr. Just. FOSTER —

This was an Election under a *Mandamus*, upon the Statute of 11 G. 1. in order to settle the Peace of the Burrough.

Here are 12 *Issues* joined, *All* found for the King; and *without Evidence*, on any of them: So that none of them have been yet *really* tried.

It is agreed “ that in case of a *single* Issue which doth not determine the Right, (which way soever found,) a Repleader may be “ granted.”

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* The 9th Issue, in this Case, falls directly within this Rule. It * P. 306.
is totally immaterial to the Question of Right.

If therefore the Verdicts on the other Issues, *upon which no Evidence was given*, vary the Case and stand in the Way of a Repleader, they ought to be *All* set aside: Or otherwise complete Justice can not be done.

And I think, as this Case is circumstanced, the Agreement mentioned by the Lord Chief Baron, * “ that the Verdicts were to be * V. ante 294.
“ without Prejudice in any *future Trial*,” may without a Strain be extended to any *future Litigation* in the Cause.

LORD MANSFIELD—

I am now fully satisfied, by what my Brothers have said, that the *whole Verdict* may be *set aside*, on *Payment of Costs*, and with *Liberty to amend the Plea*.

But that must be upon a particular Motion.

And I have no Doubt but that We may do this, *WITHOUT the Consent* of the Prosecutors.

Which Motions (to set aside the Verdict, on Payment of Costs; and, to amend the Plea, on Payment of Costs;) were accordingly afterwards made by Mr. *Norton*; and granted, after a faint Attempt by Mr. Serjeant *Poole* to shew Cause, and then to get Costs as between Client and Attorney; in both which Attempts, he was unsuccessful: For the Rules were both of them made absolute, upon Payment of Common Costs; obliging the Defendant, however, to take short Notice of Trial.

Rex *vers.* Inhabitants of Fremington.

(*Lord Commissioner Wilmot absent.*)

N^o. 133.
Friday, 19th
May 1757.

See this CASE abridged in the TABLE; and at large in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 133. pa. 416.

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* P. 307.

No. 134.
Saturday,
14th May
1757.

* *Rex vers.* Inhabitants of Alton.

(*Lord Commissioner Wilmot absent.*)

See this CASE abridged in the TABLE; and at large in the Quarto-Edition of my SETTLEMENT CASES, N^o. 134. p. 418.

* P. 314.

* *Paxton vers.* Knight.

MR. Norton shewed Cause against a Prohibition.

This was a Question whether a Prohibition should be granted, to stay Proceedings in an Ecclesiastical Court, in a Suit by a Quaker, for a Seat in a Church; founding his Title upon a *prescriptive* Right: In which Suit the Ecclesiastical Court *had determined* against him. And he now came, after Sentence below, for a Prohibition. Note—An *immemorial Prescription* was alledged on *both* Sides.

Mr. Norton—against the Prohibition, cited 2 *Ld. Raym.* 755. the Case of *Jacob v. Dallow.* 2 *Salk.* 551. S. C. 5 *Mod.* 436. S. C. Cases in *B. R.* temp. *W.* 3. 233. S. C. *Farresley*, 8. S. C.

* P. 315.

* As to Prohibitions *after Sentence*—

Hetley 92. the Case of *Eaton v. Ayliffe* (which had been cited on the other Side,) is a Case to which the Court will not pay great Attention: It was determined *temp. C.* 1. and is a loose Note; And even * Mr *Watson* in his *Complete Incumbent* treats it as a Case of no Authority.

* Mr. Just. Denison observed, that the *Complete Incumbent* was not written by *Watson*; but by Mr. Place of York.

The Court will not, *after Sentence*, grant a Prohibition, unless the Defect of Jurisdiction appears upon the *Face of the Libel*.

1 *Strange* 187. the Case of *Argyle v. Hunt*—is expressly so, in Point. And the Case of *Stone v. Fowler, Mich 9 Annæ*—there cited [Fo. 188.] is to the same Effect. 1 *Ld. Raym.* 436. is also in Point: The Church-Wardens of *Market Bosworth* v. the Rector of *Market Bosworth*; where the Spiritual Court had adjudged *against* the Custom set up; though their Law allows a *less* Time, than the Common Law, to make a Custom: But the Prohibition was denied. So here, if the Spiritual Court will admit *less* Evidence of a Prescription,

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scription, than the temporal Courts will ; And the Prescription is *nevertheless* found to be groundless ; it is certain that the Party *who sets it up*, can have no Reason to come for a Prohibition, *after Sentence*. And his only Reason for it can be, (as the Court observed in the last cited Case,) to *get clear* of those *Costs*, which he has by his own *vexatious Suit*, rendered himself liable to ; And which (as was there adjudged) he ought to pay.

BUT THE COURT seemed to think that *if* the SENTENCE of the Ecclesiastical Court was a *Nullity*, their Award of *Costs* must be so too. And here are *reciprocal Prescriptions* alledged : And the prescriptive Right of the One is determined *for* ; though that of the Other is determined *against*. They have adjudged the Adverse Prescription to be a *good* One : Which they could not try ; and which they will establish upon less Evidence than the Common Law requires.

And LORD MANSFIELD said that though he was very sorry that the Court were obliged to grant the Prohibition, (because the Party applied for it, only to get rid of paying the Costs occasioned by his own vexatious Suit ;) Yet He thought they could not avoid doing it,

Per Cur. RULE for a Prohibition made ABSOLUTE.

* *Rex vers.* Joseph Chaplin Hankey Esq ;

(*Lord Commissioner Wilmot absent.*)

* P. 316.

Monday,
16th May
1757.

ONE *Ralph Carr* an Attorney, applied for an *Information* against the Defendant, for sending him a *Challenge*.

Upon hearing the Affidavits, and the Letters that passed between these two Gentlemen, The Court thought that *Carr* himself appeared to have sent the *first* Challenge to the Other ; at least, that his Letters manifestly *imported* a Challenge : Which the other clearly so understood, and accordingly accepted, and proposed to fight with Pistols.

THE COURT held, that though the Defendant had *behaved very improperly* ; And though it would have been right for the Court to have granted even *Cross-Information*s, in case Each Party had applied for an *Information* against the other ; Yet they thought that when the *Aggressor*, who gave the first Challenge, came and applied for an *Information* against the Other who *only accepted* it, (however improperly and unlawfully ;) it was a very different Case ; And that
the

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the Court had no Reason to give him this EXTRAORDINARY Remedy, by way of Information: but ought rather to leave Him to his ORDINARY Remedy, by Action or by Indictment.

Therefore the RULE "to shew Cause why an Information
"should not be granted," was DISCHARGED.

Robinson *vers.* Raley.

Tr. 25 G. 2. Rot'lo 775.

THIS was an Action of Trespas. The Declaration contained a great Number of Counts; amongst the Rest, One in Trespas for breaking and entering the Plaintiff's Close; and depasturing it with &c; And for breaking and entering his Free-Warren; A 2d Count, to the like Effect; (but in different Years;) So a 3d, 4th, 5th and 6th; And 6 more, for breaking and entering another Close called *Sands's Piece*; a 13th for taking and carrying away the Plaintiff's Trees; and a 14th for taking and carrying away his Goods and Chattels.

* P. 317. * The Defendant had Leave to plead several Pleas: And accordingly He pleaded, 1st. The General Issue, to the whole. 2d Plea (by Leave, *ut supra*,) That As to the Close called the *Rabbit-Walks*, "That it is one Rood of Land, Parcel of a Common-Field; And
"that Mr. *Finch*, in Right of his prebendal Estate, and all &c,
"have Right of Common &c, in certain Fields called Middle
"Fields, whereof the Rabbit-Walks are Parcel:" Which Rights he derives to Himself; and so justifies under it. The like Plea, to the other 5 next Counts. He pleads, as to the 6 Issues relating to *Sands's Piece*, the General Issue. To the 13th Count, He pleads Tenancy of another Close, under the Plaintiff; And justifies under a *Licence*, and avers that it was used for Gates, &c. Another Plea was a Right of Common, &c, &c.

The Plaintiff, in his Replication to the 2d Plea to the 1st Count, traverses the Right of Common: And in his Replication to the like Pleas as to the other five Counts, traverses the Rabbit-Walks being Parcel of the Middle Fields. In his Replication to the last mentioned Plea, he traverses the Right of Common. All these Issues were *found* for the Defendant. To the Plea to the 5th Count, the Replication traverses "That the Cattle were the Defendant's *own* Cattle; and that they were *levant et couchant* upon the
"Premises, and *commonable* Cattle." To this there is a special Demurrer for Cause, (*viz.* "that the Replication is multifarious,
"and

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“ and that several Matters, specifying them, are put in Issue ;
“ whereas only *one single* Matter ought to be so ;”) and Joinder in
Demurrer. To the Plea to the 13th Count, the Replication tra-
verses the *Licence*; (after protesting “ that the Tree was not used
“ for Gates &c. as is alledged by the Defendant’s Plea.”) And to
this Replication also, the Defendant demurs specially ; and shews
for Cause, “ That it concludes to the Country, whereas it ought to
“ conclude with an Averment.”

Serjeant *Poole*, for the Defendant, complained of the Hardship the 1st Demurrer.
Plaintiff put upon the Defendant in the 5th Count, by inforcing the
Defendant to prove the Cattle to be his *own* Cattle, *and commonable*
Cattle; *and levant and couchant* upon the Land: Which Hardship
had *obliged* him to demur.

He argued, that *some One* Fact only ought to be put in Issue ;
Not *Several*.

He cited *Co. Lit.* 126. *a.* [Letters q, r.] It must be One SINGLE
certain material Point. And so also 8 *Rep.* 67. *b.* *Crogate’s Case*
[the last Resolution,] lays down the Rule accordingly, “ That an
“ Issue ought to be full and SINGLE.”

* Now here are *three* DISTINCT *Facts* put in Issue, by this Repli- * P. 318.
cation: Any One of which was sufficient.

For if the Cattle were not his *own*, or were not *levant and*
couchant, they were *not commonable* Cattle. The Plaintiff might as
well have put Twenty Facts in Issue.

This therefore is, at least, a Fault in *Form*: And We have de-
murred *specially*, and shewn this for Cause; “ That the Replication
“ is multifarious, and that *several* Matters are put in Issue (specify-
“ ing them;) whereas *only One* SINGLE Matter *ought* to be so.”

As to the *Licence*—The Replication (protesting that the Tree was 2d Demurrer
not used for Gates &c,) traverses the Licence. To this Replication,
We have demurred, *out of Necessity*: For though We really *have*
a Licence, yet the Person who gave it to Us (the Plaintiff’s Steward)
has *denied* it; and We apprehended, would do so again, on Oath.
Therefore We have demurred specially, and shewn for Cause
“ That the Replication concludes to the Country, whereas it ought
“ to conclude with an Averment.”

Now they ought to have traversed the Licence specially, and to
have concluded with an Averment. *Crogate’s Case*, 3d Resolution,
[fo. 67. *a. b.*] shews that this Licence ought to have been specially

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traversed, and concluded with an Averment." And *Raft.* 660. *b. bis.* 661, 630, 651. and 1 *Brown*, 353. and *Thompson's Entr.* 365. And many other Precedents, are so.

Indeed where the *whole* of the Plea is traversed, the Conclusion may be to the *Country*. But this is *not* a Traverse of the *Whole*. So that this is a Departure (by Mr. *Robinson*) from the common Form of Pleading.

Mr. *Yates contra* for the Plaintiff.

1st Demurrer. One Part of the Duplicity (*viz.* the Cattle not being *commonable*) is not pointed out by the Special Demurrer.

However, this Traverse is *not double*: Though I agree that it *numerally* contains several Matters; all which TOGETHER make up the Defendant's Plea, and make One ENTIRE Defence. And it is within the Reason of *Crogate's Case*, 8 Co. 67.

Whereas *Duplicity* is, where distinct Matters, NOT being Part of one entire Defence, are put in Issue. For there are Cases where several Matters may be put in One Traverse: As, for Instance, a Custom consisting of several Parts.

* P. 319. * Now All *these* Parts here traversed, make One entire Defence. For the Cattle must be *commonable, levant and couchant, and his own*: Or else, it is no sufficient Defence. To prove which, he cited 1 *Ro. Abr.* 398. Letter G. Pl. 2, 3. Letters H and I, throughout. 1 *Saund.* 227. The Case of *Stennell v. Hogg*, and 2 *Show.* 328. The Case of *Manneton v. Trevilian*, in Point.

2^d Demurrer. As to the Licence, the Cause of Demurrer shewn is, "that he ought to have maintained his Declaration; and that he ought to have concluded with a Traverse and Averment."

But Precedents are *both* ways. 2 *Brown's Entr.* 283. concludes as the present does. And whoever has seen the *whole* of this Record will not think that *either* of the Parties has concluded *too hastily*. He cited the Case of *Clark v. Glafs, Tr.* 28, 29 G. 2. B. R. to prove that where the WHOLE Contents of the Plea are denied, the Conclusion must be to the *Country*: But where, only a *particular Fact* is denied, the Conclusion must be with an Averment. He also cited 2 *Lutw.* 1399, 1401. The Case of *Hufler v. Raines*.

Serjeant *Poole*, in Reply—

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1st. As to the two Matters making but one entire Defence— 1st Demurrer.
Yet being *Variety of Facts*, they ought not *Both* to be put in Issue.
Crogate's Case, 8 Co. 67.

And the common Method is, to traverse “ that the said Cattle
“ were *levant and couchant*.”

As to the Case of *Manneton v. Trevilian*, I agree that the Cattle
ought to be *levant and couchant*. My Demurrer here is in Point of
FORM; and is special.

2dly. I do not know but the Party may go to Issue, in *some* 2d Demurrer.
Cases: But I say this is not the *common* Form.

The Case of *Hustler v. Raines*, 2 Lutw. 1399, 1401. proves
Nothing against Me.

LORD MANSFIELD held both these Demurrers to be frivolous.

The SUBSTANTIAL Rules of Pleading are founded in *strong*
Sense, and in the *soundest and closest Logic*; and so appear, when
well understood and explained: Though, by being *misunderstood*
and *misapplied*, they are often made use of as Instruments of Chi-
cane.

* As to the present Case—’Tis true, You must take Issue upon a * P. 320.
single POINT: but it is not necessary that this *single Point* should 1st Demurrer.
consist *only* of a *single FACT*. Here, the *Point* is, the Cattle being
intituled to Common: This is the *single POINT* of the Defence. But
in *Fact*, they must be both his *own* Cattle, and ALSO *levant and*
couchant; which are *two different essential* Circumstances, of their
being intituled to Common; and *Both* of them absolutely requisite.

So, as to the *Licence*—The *Licence* is the *Point* in Question. And 2d Demurrer.
this *Point* in Question, “ Whether the *Licence* was given, or not,”
is put in Issue: The *Whole* turns upon *this particular Proposition*.
Indeed it may be a different Case, where the *whole* of the Plea is
NOT *denied*; but *only some Parts* of it. But that is *not this* Case.

Mr. Yates has made right and reasonable and intelligible Dis-
tinctions: And He has cited an express Authority.

Mr. Just. DENISON concurred.

1st. As to *Crogate's Case*—The Replication “ *de injuriâ suâ pro-* 1st Demurrer;
“ *priâ absq; tali Causa*,” will do, in all Cases where Matter of
Title

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Title, and other Things of that kind, are not included in the “*absq;*” “*tali Causa:*” And if you *admit them*, You may then plead “*De injuria suâ propriâ absque RESIDUO Causæ;*” traversing that Residue. But the Rule in *Crogate’s Case* don’t affect *this Case*. For here the Question is *One single Proposition, viz. the Measure of the Common*: And the Measure of the Common is the Levancy and Couchancy jointly with the Property.

Skinner 137, is a more sensible Report of the Case of *Molliton* and *Trevilian*, than 2 *Show.* 328. And there, the Levancy and Couchancy, *together with* the Property, were esteemed to be the Measure of the Common; and *not* the Levancy and Couchancy *only*.

So that Nothing more is here traversed, than the Measure of the Common. The Case is in Point.

Besides, I think it is *within Crogate’s Case*.

^{2d}Demurrer. As to the *Licence*—It is Right, and avoids the Prolixity of Pleading. The *old Way* indeed was otherwise: but it is altered, of late.

And He cited a Case (of an alternate Way of traversing a corrupt Agreement,) which was in *M. 5 G. 1. B. R. Fen v. Alston*—Where it was holden “That the Plaintiff has a Liberty either to reply
* P. 321. “* that the Bond was given upon another Account,” and to traverse the Corrupt Agreement with an *Absque hoc*; or to deny the corrupt Agreement *directly*, and conclude to the Country. And the Case of *Baynham v. Matthews*, 2 *Strange* 871. goes upon the very same Foundation; and mentions the same Alternative.

Mr. Just. FOSTER. I am of the same Opinion.

Mr. Norton, who was also of Counsel for the Defendant, desired the Court not to give Judgment yet; but to give them an Opportunity to move for Leave to withdraw their Demurrers, and amend: Which the Court agreed to. And in a few Days afterwards, Mr. Norton moved for Leave to *withdraw* the two Demurrers, and plead to Issue; (upon Payment of Costs:) And a RULE was thereupon granted, to SHEW CAUSE.

And now Mr. Yates shewed Cause, for the Plaintiff, against the Defendant’s being at Liberty to withdraw the two Demurrers, and plead to Issue. And he cited 6 *Mod.* 102. The Case of *Crofs v. Bilson*. 6 *Mod.* 1. The Case of *Staple v. Haydon*. 1 *Ld. Raym.* 668. The Case of *Fox v. Wilbraham*, and 2 *Strange* 1002. *The Bank of England v. Morrice*.

Serjeant

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Serjeant *Poole* and Mr. *Norton contra*; for the Defendant—

The Merits have not been tried upon these Demurrers. We move this at *Common Law*; not under any Statute. And the Court are not bound down by any certain Rules. And they cited 2 *Saund.* 402. *Rex v. Ellames*, [2 *Strange* 976.] *Dutchess of Malborough v. Widmore*, *Hil.* 4 G. 2. B. R. The Case of *Cope v. Marshall. Tr.* 28 G. 2. B. R. [*V. ante* 259. S. C.]

The Case of *Giddins v. Giddins*, [*Tr.* 29, 30 G. 2. B. R.] was even after the Court had given their Opinion. *

And here is a Declaration of 20 *Counts*, manifestly intended to catch the Defendant, and to save Costs.

If our Motion is granted, the *contingent* Damages assessed, will be out of the Case, and will be as none at all.

LORD MANSFIELD—It is admitted to have been done, *after a* DEMURRER *and Argument*: But this is *after a* TRIAL; and *without any* favourable Circumstances.

Now as no Case of such an Amendment *after a* TRIAL is cited, I take it for granted that *None* EXISTS.

* These are frivolous Demurrers: And the only View of this Motion is *to get rid of the Costs*. But the Plaintiff would have had his Costs, if the Defendant had done right at first, and joined Issue upon these Facts; *if* they had been found *against* him. * P. 322.

So that here is neither Precedent, nor Reason for allowing this Motion.

Mr. Just. DENISON concurred.

Where the Demurrer is first argued, *before* any Trial of the Issues, the Court will give Leave to *amend*: As in the Case of *Giddins v. Giddins*. But this is an Attempt to amend an Issue at *Law*, AFTER a *Verdict* has been found on the Issues upon FACTS, and *contingent Damages* found upon the Demurrers: Of which, there *never was an Instance*. And We do not know where it would end; Nor do I well know how the Cause *could* be again carried down to Trial.

If this had at first gone down to Issue; and had been found *against* the Defendant; It would have carried Costs.

* It was after a Demurrer and Argument only; But the Court had given no Opinion: and the Rule was made absolute without Defence.

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The Court cannot help seeing that this is *upon* RECORD: Here are *Verdicts* and *contingent Damages* found. Therefore We cannot help this: I wish We could; because the Merits seem to be with the Defendant.

The Cases of Amendment cited are where the Whole is supposed to be *in* PAPER; Or else the Court COULD NOT *have done it*. We have no Authority to do this, AFTER 'tis plainly *upon* RECORD.

Mr. Just. FOSTER concurred.

Per Cur' unanimously JUDGMENT for the
PLAINTIFF upon the DEMURRERS.

* P. 323.

Tuesday, 17th
May 1757.

* Roberts *vers.* Peake.

M. 29 G. 2. Rot'lo. 625.

(Lord Commissioner Wilmot *absent in Chancery.*)

THIS was a Special Case reserved at *Nisi prius* at Guildhall, on a Trial there before the late Ld. Ch. J. Ryder.

It was an Action upon a *promissory Note*, brought by the Indorsee, against *One* Defendant only; though the Note imported, *upon the Face of it*, to have been made by *two* Persons: And the Declaration was upon the Note, *as if* it had been an ABSOLUTE One, payable on the * Death of a Person named in it; Whereas it appeared upon the Face of it, to have been given *upon* two several CONDITIONS. For the Note, when given in Evidence, came out to be thus "WE (naming the Defendant *Peake* AND *another Person*) promise to pay to *A. B.* 116 l. 11 s. (Value received) *on the* * *Death of George Henshaw*: PROVIDED *He leaves Either of Us* sufficient to pay the said Sum, OR *if We shall be* OTHERWISE able to pay it.

* V. ante 226. Gofs v. Nelson, on a Note payable when Defendant should come to Age; specifying when that was to be.

Signed by PEAKE only.

And yet it was laid in the Declaration, merely as a Promissory Note absolutely and in all Events payable on the Death of *G. H.*

Mr. T. Clarke of Lincoln's-Inn—*pro Quer.*

The

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The Two Questions upon this Case are—

1st. Whether this be a NEGOTIABLE Note.

2d. Whether *this* Note, given in Evidence, *supports* the Declaration; which is upon an ABSOLUTE Note payable on the Death of G. H.

First Point—There can be no Doubt but that *if* the Note given in Evidence had *not* had the Proviso added to it; but had merely been made payable *on the Death* of George Henshaw; it had been a good negotiable Promissory Note, within the Statute of 3 & 4 Ann. c. 9. [§. 1.]

* For the Contingency of the Death of G. H. is *not* such an uncertain Contingency, as that the Event may possibly or probably never happen; And *so* the Note might perhaps *never* become payable: But it is an Event CERTAIN and NECESSARY; and *no otherwise*, nor in any other Respect uncertain, than merely as to the particular TIME when it will happen. So that it is no more than the ordinary Case of a Promissory Note payable at a FUTURE Day. * P. 324.

And to prove this Doctrine, and that this is a negotiable Note, He cited 2 Strange 1217. the Case of *Cooke v. Coleham*, full in Point; being “to pay, &c, within Six Weeks after the Defendant’s Father’s Death.” 1 Strange 24. the Case of *Andrews v. Franklin*, still stronger; being “to pay, &c, within two Months after such “a Ship shall be paid off.”

Then as to the Proviso or Condition, it is made *absolutely* payable, on George Henshaw’s Death an Event which *will certainly happen*: Therefore the Proviso is repugnant to the Body of the Note. And he endeavoured to shew a Resemblance between this Case, and that in 2 Salk. 463. the Case of *Wells v. Tregusan*; and the Case in 21 E. 4. 36. and *Brooke*, Obligation 58. [S. C. abridged.]

Second Point—The Note produced in Evidence will support the Declaration.

1st Objection is “That the Note is only laid, as the Defendant’s “*several* Note:” Whereas it imports upon the Face of it, to be made by *two* Persons, jointly.

Answer. Perhaps One only *signed* it: Or if the Other did also sign it, it was, nevertheless, equally the Note of the Defendant. It is

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is laid, and must be pleaded according to its *legal* Operation. 1 *Strange* 76. the Case of *Butler v. Malisse*y is most strictly in Point.

2d Objection. "That this is laid AS *an* ABSOLUTE Note, *with-*
" *out* mentioning the two Conditions," (of being payable) "IF he
" shall be able;" or "IF *Henshaw* shall leave either of them suf-
" ficient to pay it."

Answer—But I say that this Note produced in Evidence, which contains these two Conditions, will sufficiently support the Declaration.

In attempting to support this Assertion, he mentioned 6 *Mod.* 228. the Case of *Roberts v. Harnage*. 2 *Salk.* 659. S. C. 4 *E.* 4. 29. and 1 *Strange* 76. the Case of *Butler v. Malisse*y, before mentioned.

* P. 325. * Mr. *Norton*, for the Defendant, was about to speak: But

LORD MANSFIELD stopt Him, and said, I fancy you will hardly argue this: (meaning that it was sufficiently clear on Mr. *Norton's* Side of the Question.)

Mr. *Norton*—This was an Action brought by an Indorsee; and is under very particular Circumstances.

I agree that a Note in the Name of two, and importing to be made by two Persons, may be actually signed by One only and will be good: Also that a Note may be declared upon, according to its *legal* Operation.

As to the rest—If the Court was clear, He said He would not trouble them.

LORD MANSFIELD—I am very clear.

This Note was payable *upon a Contingency*: But it is NOT *an* ABSOLUTE Note. What would it signify, to have put in all these Contingencies, *if* the Party was *absolutely* and *at ALL Events* bound to pay it upon the Death of *George Henshaw*? Most manifestly, it was not intended that he should be bound to pay it upon *George Henshaw's* Death, *at all Events*.

Therefore this is *not a negotiable* Note: For a Note payable *upon an uncertain Contingency*, is *not a negotiable* Note.

Mr. JUST DENISON concurred.

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A Note payable *eventually* upon an uncertain Contingency can never be a *negotiable* Note. And if it had been so, yet there ought to have been an Averment “that *George Henshaw did* leave One of “them sufficient to pay it;” or “that the Defendant was otherwise able to pay it”

And indeed this shews plainly that it is *not* a negotiable Note within the Meaning of the Act of Parliament; which means and intends an *absolute* Note payable *at all Events*.

And I think too, that it is a *Variance* in the Declaration, from the Note itself, *for want of setting out* these Conditions: It ought to have been set out, as it *really* was.

* But indeed One of these Points depends upon the other: And I * P. 326. think this Note is *only eventually* and *conditionally* payable and by no Means *absolutely* and *at all Events*.

Mr. Just FOSTER concurred, both as to the *Variance*; and also that it was NOT a *negotiable* Note as being payable *eventually*, and *not absolutely*.

Per Cur. JUDGMENT for the
DEFENDANT as upon a Nonfuit.

Denn, ex dimiss. Burges, Vid. *vers.* Purvis et al’.

THIS was a Special Case, upon an Ejectment tried at *Maidstone* Assizes, in *August* last.

Richard Burges, being seised in Fee Simple of divers *Gavel-kind* Messuages, Lands, Tenements and Hereditaments in the several Parishes of *L. M. B. M.* and *H.* made his Will in Writing, on 15th Feb. 1735: and thereby devised his said Messuages, Lands, &c, to his Wife *Elizabeth* for her Life; with Remainder to his Brother *Thomas Burges*, in Tail Male; with Remainder to *William Burges* (Son of his late Brother *John Burges*) in Tail Male; with Remainder to his own right Heirs for ever. And the said *Richard Burges* died without Issue, and without revoking or altering his said Will.

And the said *Thomas Burges* and *William Burges* are since dead without Issue.

On 8th September 1746, the said *Thomas Burges* made his Will: Whereby He devised All *his* real Estate in the several Parishes aforesaid, to his Wife *Ann Burges*, for her Life.

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On 6th *March* 1755, the said *Elizabeth*, Widow of *Richard Burges*, died.

In *Easter Term* 29 G. 2. the said *Ann Burges*, the Devisee of the said *Thomas B.* brought her Action of Ejectment, for a MOIETY of the above Gavelkind Lands and Premises, UPON A SUPPOSITION “that her Testator *Thomas*, (as the Brother of the said *Richard*,) and *William B.* (as the Nephew of the said *Richard*,) “were the ONLY Heirs of the said *Richard*, at the Time of his “Decease, according to the Custom of Gavelkind; and, as such, “intitled to the real Estate of the said *Richard* in MOIETIES.”

* P. 327. * On Trial of this Ejectment, it appeared, in the Course of the Evidence, “that the said *Richard Burges*, at the Time of his Decease, left a Niece (named *Mary*) the only Child of *WILLIAM Burges*, One OTHER Brother of the Testator, who, by the Custom of Gavelkind, was intitled as Co-Heir, TOGETHER with the said *Thomas* (the Brother) and *William* (the Nephew of the Testator,) to the Premises in Question.”

Whereupon, by Consent of Parties, it was ordered by the Court, that a Verdict should be given for the Plaintiff, as to One third Part of the Premises in the Plaintiff's Declaration specified; subject nevertheless to the Opinion of the Court of *King's Bench*, upon a Case to be stated upon *this Point—viz.*

“Whether the Plaintiff, on her Declaration FOR a MOIETY of the Lands, Tenements and Hereditaments therein mentioned, “can RECOVER One THIRD Part of such Premises.”

Which Order of *Nisi prius* was afterwards regularly made a Rule of this Court.

And it came on now, in the Special Paper, to be argued.

Mr. *Knowler*, being Counsel for the Plaintiff, argued—

That the Lessor of the Plaintiff must recover ACCORDING to his Title.

And this is so, Whether the Ejectment be brought for an undivided, or a several and divided Part; for the whole, or for Part of a Thing; for an Entierty, or for a Moitey,

In *Plowd.* 420, 424. *b.* *Bracebridge's Case*—the Reporter blames Himself for not having objected to the Verdict. But 3 *Bulstr.*

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184. the Case of *Cowper v. Frankline*, and many other Cases explode *Plowden's* Notion "that the Verdict was liable to Objection upon that Account."

Here, the Declaration is for *One* undivided Part; and the Verdict, for *another* undivided Part. Which is *not an immaterial Variance* from the Declaration, sufficient to prevent the Plaintiff's having Judgment.

For there is no Necessity that the Verdict should agree *precisely* with the Declaration. All that is necessary is, that the Thing, for which the Verdict is given, should be *comprized in*, and be *Part of the Thing demanded* by the Declaration.

* And it could be upon *no other Foundation*, that the Case was determined, which is mentioned in 2 *Ro. Abr. Tit. Trial, fo. 704. pl. 22*: Where an Ejectment was brought of a Messuage; And it appeared in Evidence, and was so found by the Verdict, "That only a *small Part* of the Messuage was built by Incroachment on the Lessor's Land; *not* the Residue; and yet the Plaintiff had Judgment." * P. 328.

Here, the Declaration is for a *Moiety*; to which it was then supposed that the Lessor of the Plaintiff had a Right, as Devisee of One of *two* Brothers of the Testator. Indeed it came out upon Evidence, that the Testator really left *three* Brothers and Co-heirs: So that the Lessor of the Plaintiff had in Fact a Title to a *third* Part only. And the Verdict is accordingly, for a *Third*.

But the *Moiety* INCLUDES the *One Third*. So that what is recovered by the Verdict, being *contained in*, and being *less than* what is demanded in the Declaration, this Case must be ruled by the Ground I have already mentioned, "that the Lessor shall recover ACCORDING TO *his Title*." And in Point to prove this, is the Case in 1 *Siderf. 229*, of *Ablett, Lessee of Glenham, v. Skinner*: Where the Declaration was of a *fourth Part* of a fifth Part; And the Lessor's true Title was only to $\frac{1}{3}$ of $\frac{1}{4}$ of a fifth Part; (which was ONLY A THIRD Part of what was demanded:) Yet it was resolved "that the Verdict should be taken according to the Title."

Mr. *Burrell*, for the Defendant, premised that this was a hard Case; and therefore deserved Favour, and justified the Defendant's insisting on all legal Objections. Then He urged that the Plaintiff must shew a clear Title to make *such* a Lease as is confessed by the Defendant: And, as he *knows his own Title*, he ought to set it forth AS it is.

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In the Case of *Berington ex dimiss. Dormer v. Parkhurst*; 10 G. 2. B. R. and in *Dom. Proc. May 1738. H. 11 G. 2.* The Court held that the Plaintiff could not recover; because the Demise was laid before the Time of Actual Entry: And the Lease was holden void in its Creation.

And if the Lease is laid à *Die Datús*, it will not support an Entry upon the Day.

Two Tenants in Common cannot declare upon a joint Lease. So is *Cro. Jac. 166. The Case of Mantle v. Wollington.*

* P. 329. * *Comberb. 190.* in the Case of *Moore v. Parndon*, One *Habendum* to two Demises, was indeed holden well enough, on Error brought.

3 *Lev. 334, 335.* The Case of *Goodwin v. Blackman*, was an Ejectment of the tenth Part of a Messuage described as being in two Parishes; whereas the whole lay in One of them only: It was Holden that the Evidence did not maintain the Declaration; which was precisely, of the tenth Part of an entire Thing.

Hardres 330. In the Case of *Wheeler v. Toulson*, The Court inclined that a Demise *de Herbagio et Pannagio*, did not maintain a Declaration for the Land.

And he supposed there might be a Difference between Trespass, and Ejectment: And concluded with praying a Rule for a Non-suit.

Mr. *Knowler* in Reply—Here, the Plaintiff's Title was *not* known to Her: For She supposed *only two* Brothers; And it comes out that there was a *third*.

And the Question is Whether She can recover under *this* Title.

The Plaintiff here stands in the Place of a Coparcener: And therefore She may bring her Action for *her Part, by Herself*.

The Case of *Ablett v. Skinner*, in 1 *Sid. 229*, is in Point: 'Tis the very Case, as to the Recovery being *less* than the Demand.

Therefore He prayed that the Plaintiff might be at Liberty to enter up Judgment on this Verdict.

LORD

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LORD MANSFIELD—

This is an exceeding plain Case. The Rule is undoubtedly right, “That the Plaintiff must recover *according to the Title*.” Here, She has *demanded* HALF; And She appears *intitled to a* THIRD: And So much she ought to recover.

Mr. *Knowler*’s Principles, and his Authorities are Both right: And the Case of *Ablett v. Skinner*, which He cites from 1 *Siderf.* 229. is in Point.

And so if You demand 40 Acres, You may certainly recover 20: Every Day’s Experience proves this.

* And so it is, in an Affise: *Part* may be recovered, on a Demand for the *Whole*. And no possible Objection can be made to this. For if MORE is laid, there is no Reason, why he should not recover LESS: Though the *Reverse* indeed will not hold; viz. That if he *demands less*, he shall nevertheless be intitled to *recover more*. * P. 330.

Mr. Just. DENISON concurred—And said, He thought the Case of *Goodwin v. Blackman*, cited by Mr. *Burrell* out of 3 *Lev.* 334, 335. was a strange Case. And the Case therein cited, (p. 355.) 44 *Affise* 27, of an Affise of a Mill, and a Recovery of only *Part* of it is a strong Case * against it. And that principal Case reported in 3 *Lev.* 334. is contrary to all Experience. And *Levinz* there cited several good Cases, on Behalf of the Plaintiff; which the Court did not deny. * It is put as such, by the Reporter; who makes a Quære, as to the Authority of the principal Case, and cites this old Case in order to invalidate the Court’s Determination.

Mr. Just. FOSTER concurred, And said the Case in *Siderfin* was in Point [1 *Siderf.* 229.]

Per Cur. unanimously

Let the *Postea* be delivered to the Plaintiff, in order to enter up JUDGMENT for the PLAINTIFF.

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Whiskard, Assignee &c, *vers.* Wilder.

A Demurrer to a *Declaration* on a *Bail-Bond*.

Mr. *Whitaker*, for the Defendant, Objected that the Declaration ought to have particularly *set forth* “ that the Debt was *sworn to* “ by the Plaintiff; and that the Sum *sworn to* be due, and for “ which the Defendant was holden to bail, was *marked* on the “ Writ.” For he alledged that without shewing this, here was NO SUFFICIENT *Authority to ARREST* the Defendant; And consequently the Bail-Bond is *not good*, since the Act of 12 G. 1. c. 29; but *void*. And he cited 1 *Strange* 399. The Case of *Mills v. Bond*; Where the origin Process was returnable at a Day out of Term: And it was therefore holden a *void* Process.

Now here it is not shewn, “ That the Debt was to the amount “ of 10*l.*” nor is the Sum due sworn to, or the Writ marked: All which are *essentially* requisite, by the said Act of 12 G. 1. c. 29. Sections 1 & 2.

* P. 331. Serjeant *Poole*, for the Plaintiff, argued *è contra*, That the Declaration is good, in it's present Form.

It is an Action brought by an Assignee of a Bail-Bond; Which he *properly* sets forth; and then shews the Bond to be forfeited: Which is the *whole* that is necessary for the Plaintiff to shew.

And if the *Sheriff* has holden the Defendant to Bail, when he ought not, or improperly; the Remedy of the Defendant for that, is *against* the *Sheriff*: But the *Bond* itself is *good*, and not void; (however voidable it might possibly be by Plea.)

And he said he would mention a very late Case, in Proof of his Position: Which Case was, by Name, *Nordon v. Horsley*, determined last Week, in C. B. It was an Action on a Bail-Bond, taken for *more* than the Sum *sworn to*; And this Statute of 12 G. 1. was pleaded: But the Court held the Statute to be *only directory*; and over-ruled the Plea.

Nor is it USUAL to insert this in the Declaration.

Mr. Just. DENISON—It is *often* done, and *often* not: I have often seen Declarations of BOTH SORTS; some, one way; some, the other.

Mr.

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Mr. *Whitaker*, in Reply. My Objection is, "That there is *not* a sufficient Authority set forth, for the Sheriff to ARREST the Defendant." And there is no need to plead this: For it is a void Bond.

3 *Lev.* 74. The Case of *Graham v. Crawshaw*, proves the Bond taken upon an impossible Condition, to be contrary to the Statute of *H. 6.* (23 *H. 6. c.* 10.) and to be void by it.

And so, *this* Bond also appears, upon the Face of the Declaration to be a void Bond, as being contrary to the Statute.

And 12 *G. 1.* makes this Circumstance *essential* to constitute a legal Process; and must have Reference to the Statute of the 23d of Henry 6th.

And this is not like the Case of *Nordon v. Horsley* in *C. B.*: Where the Bail-Bond was only taken for a greater Sum.

Here, the Arrest was void: And consequently, the Bail-Bond was void, too:

* LORD MANSFIELD—This has not been thought necessary to be set forth, till this Time, ever since the making of the Act of 12 *G. 1.* Nor does it, upon Reading the Act, appear to be an ESSENTIAL Requisite to the Validity of the Bail-Bond, nor in the Nature of a Condition precedent to it: But on the contrary, the Statute of 12 *G. 1.* appears to be only DIRECTORY to the Sheriff. So that though the Sheriff may be Himself answerable for such an Omission, yet the Bond is NOT VOID. * P. 332.

And I think, it is properly likened to the Case of taking Bail for a larger Sum.

In both these Cases, the Sheriff, (or perhaps the Plaintiff,) may be answerable or punishable: But the Bond is not void.

Mr. Just. DENISON concurred—He seemed to wonder that this Point had never yet been determined.

He thought the Plaintiff was *not*, in Point of Law, obliged to set this out, in order to intitle him to his Action: Thought it certainly has been often done, *pro majori Cautela*.

This Original Action appears to have been an *Acetiam* for 50 *l.* And a good Precept is set out. Therefore the Defendant was liable to be arrested. And it is set out "that he was arrested." This Act of 12 *G. 1.* does not make the Proceedings void, in Case the Defendant

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dant be arrested *without* Affidavit and *marking* the Sum sworn to, upon the Back of the Writ: It *only* PROHIBITS the Sheriff and Plaintiff from doing it. And they may indeed be liable to an Action *upon the Case* for it; (though perhaps not to an Action of *Trespass* :) But it does *not* make the *Bail-Bond* VOID.

Therefore I think there *is enough* set out, in the Declaration, to maintain this Action of Debt upon the Bond.

Mr. Just. FOSTER concurred. The Act of 12 G. 1. is *only directory*: It does *not* make the Process *void*. And as this Objection has never been taken *before*, from the Time when the Act of Parliament was made; I think it ought to be discouraged *now*, (after upwards of 30 Years.)

And *if* the Fact was so, “That there *was no* Affidavit,” the Defendant might have been relieved in a *much easier* Method; by applying to the Court, or to a Judge to be discharged upon *Common Bail*.

Per Cur. unanimously,
JUDGMENT was given for the PLAINTIFF.

* P. 333.
Wednesday,
18th May
1757.

* Henry Earl of Carlisle *vers.* Armstrong et al’.

(*Lord Commissioner Wilmot absent.*)

T HIS was a Trial at Bar on the Civil Side of the Court.

Three Questions were to be hereby tried.

1st. Whether, upon the Death or Alienation of the Tenants of the Barony of *Gillestland in Cumberland*, a *reasonable* ARBITRARY Fine at the WILL of the Lord, be payable to the Lord, or not.

2d. Whether the Tenants have Liberty to let for three Years, or mortgage, *without Licence* of the Lord, and *without paying* any Fine at all.

3d. Whether they had Liberty to *exchange*, &c, *without Licence* or Fine.

But the Defendant’s Counsel said they did not intend to insist on the 2d. Question, so that the first and third only remained in Dispute.

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About Six in the afternoon this Trial ended in a VERDICT
for the PLAINTIFF, upon all the three Issues.

Rex *vers.* White and Ward.

Friday 20th
May 1757.

THE Defendants had been convicted of a NUSANCE in erecting and continuing their Works at *Twickenham*, for making acid Spirit of Sulphur, Oil of Vitriol, and Oil of *Aqua fortis*. The Indictment run thus, *viz.* That “at the PARISH of *Twickenham*, “*&c.*, near the King’s Common Highway there, and near the “Dwelling-Houses of several of the Inhabitants, the Defendants “erected 20 Buildings for making noisome stinking and offensive “Liquors; and then there made Fires of Sea-Coal and other “Things, which sent forth abundance of *noisome offensive* and *stinking* “Smoke; and made, *&c.*, great Quantities of *noisome offensive* “*stinking* Liquors, called, *&c.*; whereby and by reason of which “noisome offensive and stinking, *&c.*, the *Air was impregnated with* “*noisome and offensive Stinks and Smells*; to the Common Nuisance “of all the King’s Liege Subjects *inhabiting*, *&c.*, and travelling “and passing *the said King’s Common Highway*; and against the “Peace, *&c.*”

* Sir Richard Loyd—for the Defendants—(on Monday 15th November 1756,) would have moved a *mixed* Motion; *viz.* both for a *new Trial*, and *also* in *Arrest of Judgment*; or, at least, in *Arrest of Judgment first*, and for a *new Trial afterwards*. But * P. 334.

THE COURT held, that neither of these Methods could consist with the GENERAL RULE of the Court, or with a *particular Rule* made in this Case, to give them Leave to move *either* of these Motions on this Day, though the 4 Days given upon the *Postea* were expired. Whereupon Sir Richard was obliged to begin with the Motion for a *new Trial*. And He said that this Indictment was laid for making a Liquor, from whence the Air was impregnated with *noxious, hurtful, unwholsome*, and stinking Qualities: And the *English* Word “*noxious*” answers to the *Latin* “*nocivus*.” But it appeared He said, *upon the Evidence*, that the Fumes, however offensive and disagreeable to many Persons, were by no Means in reality *noxious, hurtful* or *unwholsome*; but the *contrary*.

Rule to shew Cause: With this Addition,—“That the Defendants should have 3 Days Time to move in Arrest of Judgment; *after* the Court shall have given their Opinion upon the *present* Motion, for a *new Trial*, as upon a Verdict “AGAINST Evidence.

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On *Tuesday* the 23d of the same Month, Mr. Just. DENISON reported the Evidence; which was of great Length, He said, there being about 75 Witnesses on each Side: However He collected the *Substance* of it together in his Report. It appeared to be very strong on the Part of the Prosecution: And He declared himself *satisfied* with the Verdict. And it appeared upon his Report, that the Smell was not only *intolerably* offensive, but also *noxious* and *hurtful*, and made many Persons sick, and gave them *Head-Achs*.

Mr. Just. FOSTER said that "*Noisome*" and "*Noxious*," were synonymous Terms; and that there was no other *Latin* Word for "*noxious*," but *nocivus*."

The Rule was therefore DISCHARGED, as to *Setting aside* the Verdict.

On the *Saturday* following, Sir Richard Loyd, Mr. Norton, Mr. Serjeant Hewit, and Mr. Nares, moved in *Arrest* of Judgment; (which was not yet signed.) They objected to the *Indictment*; It being laid *generally*, at the PARISH of *Twickenham*; and only said "*near* the Common Highway;" but not said to be IN the *Town* or *Village*: It may be upon a Heath or Common, for Aught that
* P. 335. appears to the contrary. Though it appears by 2 *Ro. Abr.* 139. Title *Nusance* Letter F. pl. 2. *Rankett's Case*, that making Candles, even in a Vill, which caused a noisome Scent to the Inhabitants, has been holden to be *no* Nusance.

But here, NO OFFENCE is *precisely* laid. It charges "that by reason of the noisome offensive and stinking Smoke, the Air was impregnated with noisome offensive Stinks and Smells:" which are vague uncertain Terms. As to "*noisome*" V. *Minsbrow*, and *Skinner's Etymologicon*.

Tremaine's Pl. Cor. 195. *Rex v. Brookes* (for keeping a Glasshouse uses the Words "*unwholsome* and *dangerous*." *Ibid.* 198. *Rex v. Cole*, (for a Nusance in keeping a Soap-boiler's Furnace,) "*unwholsome, turpibus, periculosissimis, contagious* and *infectious*." Here, 'tis only said to be "*noisome and offensive*." It ought to have been laid *precisely* and *particularly*. * 2 *Hawk. P. C.* 184, 185, 186. "*Hurtful*" is also a vague Term: It ought to have been laid to be *insalubrious*.

* But all this relates only to indictments for Murder and Man-slaughter; and does not concern Nusances.

As to the vague Term, "*Near*," there was a Case of *Wilkes v. Broadbent, Pasch.* 1745. *B. R.* where a Custom "to lay Rubbish "*near* the Eye of a Coal-Pit" was held bad: though that was a *Civil Suit*,

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Suit, and the Custom found by a Verdict. Much more, upon an *Indictment*. And this is a lawful Trade; and can become a Nuisance only by Accident, viz. by being so to a *Town* or *High-road*. It can be indictable only for being exercised in the *Heart* of a Town. For, according to 2 *Show.* 327. *Rex v. Pierce*, "Such Trades ought not to be in the *principal* Parts of the city; but in the Out-Skirts." And the Court will *not here presume* that this was in the Town. Besides *Hurtfulness* is the Gift of this Indictment. *Palm.* 198, 199.

Serjeant *Davy*, Mr. *Morton* Mr. *Aston*, Mr. *De Grey*, Mr. *Stow*, and Mr. *Thurlow*, *contra*, for the Prosecution, answered, that "*Noisome*" conveys indeed a complex Idea; but still includes "*Hurtfulness*." It stands in the Place of the Latin Word "*nocivus*," and certainly imports a Nuisance. 2 *Ro. Abr.* 139. Letter *F.* pl. 2. *Ran-kett's* Case of a Tallow-Chandler is as it has been cited: But 1 *Hawk. P. C. Pa.* 199. c. 75. §. 10. *Wonders* at and disputes that Determination.

"*Near*" is sufficiently certain; and was as particular as the *Nature of the Thing* would admit: For it was not *equally* near to *all* the Houses. And *after a Verdict*, it shall be *intended* to be so near as to be a Nuisance.

As to the Case of *Wilkes v. Broadbent*—A *Prescription* must be certain: Besides, that was laid too extensive and arbitrary. But here, it's being laid "*at the Parish of Twickenham*" is sufficient. * *P.* 336. And in Fact, it is a very populous Place.

They cited *Jacob Hall's* Case, 1 *Mod.* 76: who had erected a Rope-Dancer's Stage at *Charing-Cross*. *Per Hale*, Ch. J. "It becomes a Nuisance to the *Parish*." That was the Foot he put it upon. And this Indictment of ours is laid extensively enough to be a *Common* Nuisance; though not a *public* One: Nor did it, in Fact, affect *other* Persons than those living and passing *near* it.

Their Objections come too late, after Verdict: For it is a mere Matter of Evidence, "Whether it was noxious, or not." And 'tis plain that the Defendants *understood* the Word "*Noxious*" in the Sense of "*Unwholesome*;" because they defended themselves upon *that* Foot, and examined many Witnesses *about* the Unwholesomeness of the Stench. In *Cro. Car.* 510. *Tobayle's* Case, (there cited in the Case of *Morley v. Pragnell*,) Erecting a Tallow-Furnace cross the Street of *Denmark House* in the *Strand* was adjudged a Nuisance, and to be removed. Nay, an *offensive* Stench is of itself a Nuisance; even

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even though it should *not* be strictly hurtful. An Indictment merely for a *Stench* would have been good; even *without any* Epithets. It depends upon *rendering the Property of other Persons incommodious and uncomfortable* to them: And this Point is to be tried by a Jury, “Whether the Thing be really *such* a Prejudice or Incommodioufness to the Neighbourhood, as amounts to a Nuisance.” And here the Jury have found it so.

And as to the *Place*—That also is Matter of Evidence. The Court can not take Notice, *ex officio*, of the Boundaries of the Parish of *Twickenham*. It is the *Concourse of People* that this Point must depend upon. And “*near*” is the strongest Word that We could use, agreeably to the Circumstances of this Case. And the Jury, who have examined it, have found for Us.

Sir *Richard Lloyd* in Reply—Asserted that the Epithet “*Offensive*,” alone, would not be sufficient. And as to the Word “*near*,” He observed that the Jury have not found *how* near it was. And the laying it generally “*in the Parish*” at large, does not shew that it is a Fact indictable: For it might be at a vast Distance from any House, or Place of Resort.

LORD MANSFIELD thought there was nothing in the Objections: Which, he said, are reducible to 3 Heads; *viz.*

1st. That there is no sufficient Charge of the *Hurtfulness*;

2dly. That it is not precisely charged, “*to whom*” the Hurt is done;

* P. 337. 3dly. That it is only laid generally, “*in the PARISH of Twickenham.*”

First—The Jury have found “*that it is to the Common Nuisance of the King’s Subjects dwelling, &c, and travelling, &c.*”

And the Word “*noxious*” not only means “*hurtful and offensive to the smell*,” but it is also the Translation of the very TECHNICAL Term “*nocivus*,” and has been always used for it, ever since the Act for the Proceedings being in *English*.

But it is NOT necessary that the Smell should be *unwholsome*: It is enough, if it renders the *Enjoyment* of Life and Property *uncomfortable*.

Secondly—The *Persons* incommoded are sufficiently described: And the Offence is charged to be to the Common Nuisance of Persons inhabiting

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inhabiting and travelling *near*, &c. And unless they had been so *near* as to be hurt by it, the Indictment could *not* have been *proved*. Whereas in the Case of *Wilkes* and *Broadbent*, it was *quite uncertain how near*, the Rubbish might be laid.

Thirdly—It is *sufficiently laid*, and in the accustomed Manner. The very *Existence* of the Nuisance depends upon the Number of Houses and Concourse of People: And this is a *Matter of Fact*, to be judged of by the Jury. And in the very Cases in *Tremaine* 195. of a Glasshouse, and 298. of a Soap-boiler's Furnace,—they are laid in *Parishes*, “*apud Paroch' &c.*” Therefore there is no Foundation for the Objections.

Mr. Just. DENISON—There is a *sufficient legal Certainty* in this 1st. Indictment: So that the Defendants had an Opportunity of making a proper Defence at the Trial.

Upon a former Trial, the Indictment then before the Court 2dly. charged the Air to be corrupted. *This* present Indictment is better expressed. The Word “*noxious*” includes the complex Idea, both of Infalubrity and Offensiveness. And there was no Need to specify particular Instances of the Effects of it. There is nothing in this Ojection. And it is also sufficiently charged, *to whom* the Nuisance is done.

As to the laying it in a *Parish*—It is likewise sufficient. In the 3dly. Case of the *King v. Blower*, Hil. 27 G. 2. B. R. The Court declared they would take the Vill and the Parish to be co-extensive: And they held that there were *only* two Cases where it was necessary to * lay a Vill; which were upon the Statute of Additions (where you * P. 338. are tied up to the Vill,) and in an Appeal of Death, upon the Statute of *Gloucester*, cap. 9. The Description of being “*PROPE altam viam regiam*,” is the *Common Method*. And it is laid *ad commune Nocumentum*: And the Jury have *found it*, as it is laid. Therefore I think 'tis in legal Form.

Mr. Just. FOSTER—The only Question is “Whether the Fact 1st. “*laid implies* a Nuisance.” I think it *does*. Otherwise, the mere *Laying* it to be “*ad commune Nocumentum*,” would not perhaps help it. This is certainly a *Common Nuisance*. And “NEAR the 2dly. “*Highway and Dwelling-houses*,” is properly alledged, in order to shew it to be so. *V. 1 Strange* 686, 687. *Rex v. Pappineau*, H. 12 G. 1. B. R. in Point, accord. It never was objected that laying a Robbery “*in OR NEAR*” a * Highway, is bad: No; 'Tis Matter * V. 1 E. 6. of Evidence. c. 12 §. 10. 3dly.

[Note—Mr. Justice *Wilmot* was absent, in the Court of Chancery.]

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So that the COURT were unanimous in *denying the Motion*.

Yet *N. B.* That (according to the usual Course in like Cases) *no Rule* at all was here taken in the Rule-Book: Only, the Counsel for the Defendants *took nothing by their Motion* in Arrest of Judgment.

On *Thursday 5th May 1757*, On a Motion for the Judgment (or rather Sentence) of the Court upon the Defendants, for the Offence whereof they stood convicted,—It appearing that the Nuisance was *absolutely REMOVED*; (the *Works being demolished*, and the Materials, Utensils and Instruments, *all sold and parted with*;) They were, upon entering (Each for himself only, and for such as acted for or under him) into a Rule “not to renew them,” only *fined 6s. 8d.* each. But on a Dispute afterwards arising, how the Rule should be drawn up, It was on *Friday 20th May* settled by the Court to be thus—“By Consent of Counsel on both Sides, It is ordered that, upon the Defendant *Ward's* undertaking that neither He nor any other Person by *his Consent or Direction* or for *his Use or Benefit*, shall for the Future make or cause to be made in the Works lately carried on by the Defendant *White* at *Twickenham*, mentioned in the Indictment in this Cause, any acid Spirit of Sulphur, or Preparations of Vitriol, or Oil of *Aqua fortis*; a Fine of *6s. 8d.* be set upon the said Defendant *Ward*, for the Nuisance of which He has been convicted.” And

The Defendant *White* entered into a like Rule, *mutatis mutandis*.

* P. 339.
Saturday,
21st May
1757.

* Bond *vers.* Isaac.

THE Defendant being brought into Court in Obedience to a Writ of *Habeas Corpus* applied for by his *Bail*; and it being agreed that He was in Custody of the Keeper of the *Savoy*, as an *impressed Man*; The Counsel on Behalf of the *Bail* insisted upon their *Right TO SURRENDER him*.

THE COURT (namely Lord *Mansfield*, Mr. Just. *Denison*, and Mr. Just. *Foster*) had no Doubt of their Right: But only hesitated as to the *Disposition of Him*, after He had been surrendered. Lord MANSFIELD mentioned the Clause in the Pressing Act (*V. 29 G 2. c. 4. §. 14. p. 175.*) of not taking Him out of the Service. Mr. Just. DENISON cited two Cases; *viz.* 1 *Strange* 641. The Case of the *Bail of Eoise and Sellers*, in this Court; Where the Defendants were returned to be charged with two Civil Suits and several *Exchequer-Informations* for Frauds in the Customs: And when the Court was satisfied of the Reality of the Debts and Priority of the Actions here,
The

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The Defendants were surrendered, and committed *to the Marshal*. And a Case in *Tr. 22, 23 G. 2. Rex v. Chitty B. R.* where the Defendant was returned to be charged with a *Contempt in the Exchequer*: He was surrendered by his Bail here; and committed to the Marshal; who was immediately served with a new *Habeas Corpus*, to remove him to the *Fleet*.

This Man is a Soldier now; And by this Act *cannot be taken out* of the King's Service, but upon some CRIMINAL Matter: (*V. the Act, as above.*) So that it seems that He *may* be remanded to the *Savoy*, in the present Case.

Mr. Just. FOSTER—In the Cases cited by my Brother *Denison*, the Proceedings were grounded on 25 *E. 3. c. 19.* (which enacts “that the King's Debtors shall not be protected from the Proceedings of their other Creditors against them:”) And it was a Matter of *Right*. This is an *Indulgence* to the Bail, to permit them to bring in the Defendant and surrender him. But We cannot take him out of the King's Service; this not being a *criminal* Matter: (*V. ut supra, 29 G. 2. 4. § 14.*) So that We *may*, after We have entered an *Exoneretur* upon the Bail Piece, remand him to the legal Custody at the *Savoy*.

LORD MANSFIELD—We may *first* commit him to the Marshal; And *then* remand him, immediately, to the *Savoy*.

Suppose him to be a Soldier *at large*, (not in Custody;) and that * P. 340. his Bail were to bring him in, and surrender him: He must be committed to the Custody of the *Marshal* upon such Surrender; but *instantèr set at large*: And so we may do here. And accordingly,

Per Cur. He was, upon being surrendered by his Bail, first committed to the Custody of the Marshal: But the Marshal was Ordered to deliver him *Instantèr* to the Keeper of the *Savoy*; And He did so, immediately, in Court. And an *Exoneretur* was Ordered to be entered upon the Bail-Piece. *V. Post.*

Capron *vers.* Archer.

U P O N a Question concerning the TERMS upon which the Bail should have *Time to surrender the Principal*, after a Writ of Error brought—

Mr. Just. DENISON and Mr. Just. FOSTER, the only two Judges in Court, held That it was the ALLOWANCE of the Writ of Error, that was a *Superfedeas* to the Proceedings below; And that the

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NOTICE of its being allowed was only to bring the Party in Possession of the Judgment below, into *Contempt*, in case he should persist in proceeding thereupon *subsequently to such Notice*. And therefore, as in the present Case, the Defendant's Writ of Error was ALLOWED BEFORE the Time was expired within which the Bail had Indulgence to surrender the Principal, THOUGH NOTICE of such Allowance was not given to the Plaintiff's Attorney *till* AFTER the Expiration of that Time; The COURT gave the Bail the same *Terms* as are usual where they apply WITHIN *the Time* indulged to them (by the present Course of the Court) for surrendering the Principal. And accordingly, The RULE to shew Cause why the Proceedings "upon the Writs of *Scire facias* issued against the Bail should not "be stayed, until the Writ of Error shall be determined; The Bail "undertaking to pay the Plaintiff the Damages recovered by the "said Judgment, OR *surrender the Defendant* into the Custody of "the Marshal of the Marshalsea of this Court within four Days "next after the Determination of the said Writ of Error, in Case "the same shall be determined in Favour of the Defendant in "Error," was MADE * ABSOLUTE.

* For the clearer Understanding of the *different Terms* granted to the Bail, under *different Circumstances*, see *Myer v. Arthur*, 1 *Strange* 419. *Hunter v. Sampson & al*, 2 *Strange* 781. *Everett v. Gery*, 1 *Strange* 343. *Richardson v. Jelly*, 2 *Strange* 1270. *Cole v. Buckland*, 2 *Strange* 872: (particularly the 1st and 4th of these Cases; which shew the *Distinction*.)

* P. 341.* *Pelly the Younger vers. Governor and Company of the Royal-Exchange Assurance.*

Monday,
23d May
1757.

THIS came before the Court, upon a Case reserved on a Trial at *Guildhall*, before Lord *Mansfield*: Where a Verdict was found for the Plaintiff, subject to the Opinion of the Court. It was an Action of Covenant upon a *Policy of Insurance*.

Case. The Plaintiff being Part-Owner of the Ship *Onslow*, an *East-India Ship*, then lying in the *Thames*, and bound on a Voyage to *China* and back again to *London*, insured it at and from *London*, to any Ports and Places beyond the *Cape of Good Hope*, and back to *London*; free from Average under ten *per Cent.* upon the Body *Tackle Apparel Ordnance Munition Artillery Boat and other Furniture* of and in the said Ship: Beginning the Adventure upon the said Ship &c, from and immediately following the Date of the Policy; and so to continue and endure until the said Ship, *with all* her *Ordnance Tackle Apparel &c*, shall be arrived as above, and hath there moored at Anchor 24 Hours in good Safety. And it shall be lawful for the said Ship, in this Voyage, to proceed and sail to and touch and *stay* at any Ports or Places whatsoever, without

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out Prejudice to this Assurance. The Perils mentioned in the Policy, are the Common Perils; *viz.* of the Seas, Men of War, FIRE, Enemies, Pirates, &c, &c, and all other Perils, Losses and Misfortunes, &c. The Premio was 7 Guineas *per Cent.* with the usual Abatement of 2 *per Cent.* in Case of a Loss.

The Ship sailed &c; arrived in the River Canton in China; where she was to stay, to *clean and refit*, and for other Purposes. Upon her Arrival there, the Sails, Yards, Tackle, Cables, Rigging, Apparel, and other Furniture were, by the Captain's Order, *taken out* of her, and PUT INTO a Warehouse or Storehouse called a Bank-Saul, BUILT FOR THAT PURPOSE ON a SAND-BANK or *small Island*, lying in the said River, near one of the Banks, called Bank-Saul Island, about 200 or 220 Yards in Length, and 40 or 50 Yards in Breadth; *in Order* to be there *repaired, kept dry, and PRESERVED till* the Ship should be heeled and cleaned and refitted. Sometime after this, a Fire accidentally broke out in the Bank-Saul belonging to a Swedish Ship; and communicated itself to another Bank-Saul, and from thence to the Bank-Saul belonging to the *Onslow*; and consumed the same, with *all the Sails, Yards, Tackle, Cables, Rigging, Apparel, and other Furniture* belonging to the *Onslow*, which were therein.

* It was stated, that it was the universal and *well known* USAGE, * P. 342. and has been so for a great Number of Years, for all *European* Ships which go a *China-Voyage*, except *Dutch* Ships, (who for some Years past are denied this Privilege by the *Chinese*, and look upon such Denial as a great Loss,) “ when they arrive near this Bank-
“ *Saul Island* in the River Canton, to *unrig* the Ship, AND to take
“ *out her* Sails, Yards, Tackle, Cables, Rigging, Apparel, and
“ other Furniture; and to put them on Shore, in a Bank-Saul built
“ for that Purpose on the said Island (in the Manner that had been
“ done on the present Occasion by the Captain of the *Onslow*,) in
“ order to be there repaired kept dry and preserved until the Ship
“ should be heeled cleaned and refitted.” And the Case further states that it appears that the so doing is *prudent*, and for the Common and General Benefit of the Owners of the Ship, the *Insurers*, and Insured, and ALL Persons concerned in the Safety of the Ship.

The Ship arrived from her said Voyage, in the *Thames*, in September 1755; (having been unrigged, and put in the best Condition the Nature of the Place and Circumstances of Affairs would permit.)

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Question. Whether the Insurers are *liable* to answer for *this* Loss. (*so happening upon this Bank-Saul,*) within the Intent and Meaning of this Policy.

Mr. *Williams*, for the Plaintiff,—after premising, That this Question arises upon the Construction of a Policy of Insurance; That these Policies of Insurance are of ancient Date; are beneficial, as they tend to divide the Risk; and have been every where encouraged, in Trading Countries; made these three Divisions of his Argument.

1st. He undertook to prove that the Plaintiff's Demands are founded on strict *Justice*;

2dly. That they are agreeable to both the Words and *Meaning* of the Policy; and supported by legal Determinations.—

3dly. He said He would mention the Opinion of *foreign Lawyers*, upon the Subject.

Objection. Indeed it has been objected “that this is *not* a Loss AT SEA;” But “A Loss at *Land*.”

Answers to it. First, The Policy is *general*: It is *not confined* to Losses at Sea.

* P. 343. * Secondly—This is *not* a Loss at *Land*: It is what happened upon a *Sand Bank in the River*.

Then he proceeded to his 3 Heads or Divisions of his Argument.

1st. Head of Argument. 1st. As to the *Justice* of the Plaintiff's Case—

The Insurers have professedly and explicitly insured the Ship and all her Rigging, Furniture, &c, from Fire, &c, *from her going out to her RETURN*: And they must be taken to be *apprized of the Usage*; and to have *calculated* their Premium *accordingly*. And what has here been done is stated to have been done “for the *Benefit of the Insurers*, and of the *Ship*, and of *all Persons concerned in the Safety of it*,” and also “to have been *prudent*.”

If the *Body* of the Ship had been burnt in this Interim; and these Sails and Furniture, had been *saved BY BEING in this Warehouse*; the Insurers would then have had the Benefit of *this Salvage*. Therefore they ought, in the *contrary Event*, to be *answerable*

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able for them, when *they* were by these Means burnt, and the *Ship* not burnt. It was the Captain's Duty, to perform the Voyage in the usual and proper Course. And this was so far from being a Neglect or Misbehaviour in the Captain, that He is stated "to have acted PRUDENTLY, and for the BENEFIT of the Insurers and of All concerned."

2dly. This is within the *Words* of the Policy—"Tis an Insurance ^{2d. Head of Argument.} from London to any Ports or Places beyond the Cape of Good Hope, and back; and DURING THE VOYAGE:" And Fire is expressly insured against.

And it is also within the *Meaning* and *Intent* of the Policy. For this Loss has happened within the *USUAL Course of the Voyage*, and of this Species of Trade. And therefore the Insurers are liable. And this is the true Distinction. To prove which, He cited 2 Salk. 445. *Bond v. Gonfales*: "Deviation or not, must be taken according to the Necessity and Usage." *Clayton v. Simmons* 11th March 1741. at Guildhall. *Per Lee*, Ch. J. "If the Master puts into a Port not usual, or stays an unusual Time, it is a Deviation, and discharges the Insurer: Not, if he does as *USUAL*." *Tierney v. Etherington* 5 March 1743. *per Lee*, Ch. J. at Guildhall—The Goods were unloaded and put into a *Store-Ship* at *Gibraltar*; and there lost. The Question was, Whether this was a Loss at Land; or a Loss in the Voyage. He held "that Policies ought to be construed largely, and for the Benefit of the Insured; and according to the Course of Trade and the Methods *USUAL at the Place*:" And as * that was the known Course of Trade at *Gibraltar*, He held "the Insurers to be responsible." And in Easter Term following (P. 1744. 17 G. 2.) there was a Motion for a new Trial: Which was refused. Now that was not within the *Words* of the Policy: And yet holden to be within the *Meaning* of it. * P. 344.

Where an Insurance is for one entire Voyage, the Contract can not be suspended, and revived again: If it be suspended at all, 'tis determined. And yet they will hardly argue, that this Contract was absolutely determined by this Act that is stated.

3dly. As to the Opinions of foreign Writers They hold—"that where the Assurance is general, the Insurer is liable to all Loss ^{3d Head of Argument.} happening in the usual Course of the Voyage."

And to this Purpose, he cited, *Loccenius, de Jure Maritimo* L. 2. c. 5. sect. 10. *de Aversione Periculi*. Whose Distinctions turn upon the Master's pursuing the usual Course of the Voyage, *Marcarlus, de Jure Mercator*. L. 2. c. 15. N°. 148. *Roccus, de Affecurationibus*, N°. 138. The Insurer is liable for all Losses *durante Itinere*.

So .

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So that the Principles of Justice and Equity, the Strictness of Law, and the Opinions of Foreign Writers, All concur in Favour of the Plaintiff.

Sir Richard Lloyd, for the Defendants (the Insurers,) agreed to Mr. Williams's General Principles; And that the Insurers were liable for all Losses during the *Course of the Voyage*. But He denied Mr. Williams's Conclusions; and insisted that this Policy was certainly confined to Losses *at Sea*: Whereas *this* Loss was a Loss *on Shore*. This is a Policy upon the Body of a *Ship*; And therefore is manifestly confined to Losses *at Sea* only. Besides, these Goods are averred by the very Declaration itself, "to have been carried * *on Shore*." And it's being an Insurance "*out and Home*," does *not interfere* with this Position. As to the Supposition "that the *Ship* had been "burnt, and the *Sails, &c*, saved;" It is no Argument at all: For if they had *not been lost*, the Insurers could *not* certainly have been liable to pay for them. As to the *Prudence* of the Captain—It might be prudent with Regard to the *Owners*: But this Care of *them* is not to affect the *Insurers*. He is indeed to act his best, for Both: but *diverso Intuitu*; and not to serve the One, at the *Risque* of the Other. As to the *Words* of the Policy—He denied it to be *within* them; referring Himself to the Words themselves.

* Some of the Breaches are so assigned.

The *Cases cited* do not affect the present Case: And *foreign Writers* have said no more than *English Ones*. For no Doubt, the Insurance must be understood to be in the *usual Course of Trade*, and *durante Itinere*. But the Question is, "WHAT is the *Iter* insured."

* P. 345. * This is a *Common Policy* of Insurance, in the old and ordinary Form: And it must be understood, as these Policies were understood, before the *East India Company* had a Being. And the *Intent* of it must be collected from the Instrument *itself*.

Now this is an Insurance of the Ship with it's Tackle and Furniture, &c, *from Port to Port*. And Policies must be construed upon the *Words* of them, or from *necessary Consequences*. If any Thing *beyond* the natural Import of the Words was intended, it ought, to have been *specified*: If not specified, it cannot be supposed.

The *Court alone* are to Judge of the *Extent* of the Contract. And these Contracts have been construed *strictly*. A *Deviation* from the particular Voyage insured, shall discharge the Insurer; unless a *Necessity* intervenes; which does, and ought to alter the Case. But even that must be *within the Compass of the Voyage described*: For if it happens *AFTER a Deviation*, the Insurer is discharged, even though the Ship should have returned into the right Road again, before

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before the Accident happened. Now this present Accident did *not* happen WITHIN *the Voyage insured*: For it happened AT LAND.

But Mr. *Williams* says “this happened in the *Course of Trade*. My Answer is, “That We have nothing to do with the *Course of Trade*.” We have nothing to do with any Thing but the *Course of NAVIGATION*; which is quite a different Thing. These Sails, Tackle, &c, were insured IN *the Ship*: And if the Captain takes them out of the Ship and puts them *any where ELSE*, the Insurers are *not* answerable. And it’s being for the *Benefit* of the Ship, &c, makes no Difference. It did not arise from Necessity: Much less from a Necessity arising in the Voyage. This Act of mere Prudence or Convenience cannot affect the *Insurers*. And their *knowing* this to be the *Course* of the Voyage, will not prove that they meant to insure any Thing at *Land*. They *cannot*, by their Charter, do it; for that restrains them from insuring at Land: and therefore they certainly *never intended* it. As to the Case of *Tierney v. Etherington* P. 17 G. 2. It was *not* a Common Policy. It was thereby agreed “that they might unload, &c, and *reship* into an *English Ship*.” But no *English Ship* being there, they unloaded upon a *Store-Ship*. And this was a Peril at SEA; for the Ship was lost at *Sea*: So that it strictly and properly was WITHIN *the Voyage*. And as to it’s being the Mode of Re-shipping, in Case no other Ship was there; here is no such Agreement in the present Case, as was there inserted in the Policy: So that it was within the very *Terms* of the Policy, in that Case. He cited the Case of *Fitzgerald v. Pole*, in P. 23 G. 2. in B. R. and afterwards in *Dom’ Proc.* in May 1752; which was an Insurance of a Privateer for four * P. 346. Months: And there the *whole Cruize* was by this Court understood to be insured; And the Insurers were holden here, to be bound, though the Ship itself was safe; and accordingly they gave Judgment for the Plaintiff. But the House of Lords held them discharged; as the *Ship* was safe; and affirmed the Judgment of the Exchequer Chamber, who had reversed that of B. R. And there is no Inconvenience in my Doctrine: Because whatever is by the Parties particularly *meant* to be insured, *beyond* the general Meaning of the Words, may be *specially* inserted in the Policy; And then all will be clear; and nothing left to uncertain Construction.

Mr. *Williams* in Reply—

This Fire happened *during the Course of the Voyage*. And this Insurance is *not merely* upon the Ship; but upon the Rigging, Sails Tackle and Furniture likewise; which in their Nature are capable of being carried on Shore, and *usually* are so, upon these Occasions, as is expressly stated.

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And this is a Loss happening in *Port*. It is the proper, and the only Port, where the *English* can clean and refit their Ships. And being *upon a Sand-Bank* in the River, is a Loss at *Sea*, not at Land. If the Goods cannot be removed from on Board One Ship to another, the Reason of that must be, that the Insurer has had only that *particular Ship* in Contemplation, on *which* he insured; and perhaps the Care and Caution of the *Master* of it too, *as well* as the *Goodness* of the Ship.

This taking out and depositing the Rigging, Sails and Furniture was a *necessary Act*; and is done by all the Nations in *Europe*, except the *Dutch*; who are stated to consider it as a Disadvantage that they are not permitted to do it. And it is stated to be for the Benefit of the Ship, and of the Insurers, and All concerned. And this being the usual Course of the Voyage, it was unnecessary to particularize or specify this in the Policy: It must necessarily have been in the Contemplation of the Insurers.

And as to the Company's being *obliged by their Charter*, not to insure on Land—The Merchants insuring with them are *not obliged to know* this: Nor do the Company in fact *practise* it. Besides, if they *do it, notwithstanding* their Charter, they are not the less bound to answer what they have undertaken. And indeed the Charter only means to preclude them from insuring *Houses and Buildings* at Land, (which is quite another thing;) *not Ships* at Land.

As to the Case of *Fitzgerald v. Pole*, There was *no* Loss of the *Thing insured*: Whereas here is a Loss of the *very Thing* insured.

* P. 347.

* LORD MANSFIELD said It was very necessary that the Determinations upon Policies of Insurance should be fixed and certain: And therefore they would consider this Matter, and look into the Cases; and then (within the Term) give their Opinion,

CUR. ADVISARE VULT.

LORD MANSFIELD now delivered the Opinion of the Court.

He stated the Case minutely, and then the Question; which was
“ Whether *this* was a Loss for which the Insurers are *responsible*,
“ within the *Intent and Meaning* of the above-mentioned Policy of
“ Insurance.”

By the express Words of the Policy, the Defendants have insured the *Tackle, Apparel*, and other *Furniture of the Ship Onflow*, from *Fire*, during the *whole Time* of her Voyage, *until* her Return in safety to *London*, *without any Restriction*.

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Her Tackle, Apparel, and Furniture were inevitably burnt in *China*, during the *Voyage*, before her Return to *London*.

The Event then which has happened is a Loss within the *General* Words of the Policy: And it is incumbent upon the *Defendants*, to shew, from the Manner in which this Misfortune happened, or from other Circumstances, “ that it ought to be construed a Peril “ which they did *not undertake* to bear.”

From the Nature, Object, and Utility of this kind of Contract, Consequences have been drawn; and a System of Construction established, upon the ancient and inaccurate Form of Words in which the Instrument is conceived.

The Mercantile Law, in this Respect, is the same all over the World. For, from the *same* Premises, the sound Conclusions of Reason and Justice must universally be the *same*.

Hence, among many other, the following Rules have been settled.

If the *Chance* is *varied* or the *Voyage* altered by the *Fault* of the Owner or Master of the Ship, the Insurer ceases to be liable: Because he is understood to engage that the Thing shall be done, safe from fortuitous Dangers; *provided* due means are used by the Trader to attain that End.

* But the Master is *not in Fault*, if what he did was done in the * P. 348. *usual Course*, or *necessarily ex justâ Causa*.

The Insurer, in estimating the Price at which He is willing to indemnify the Trader against all Risques, must have under his Consideration the *Nature* of the Voyage to be performed, and the *usual Course and Manner* of doing it. Every thing done in the *usual Course* must have been *foreseen* and in *Contemplation*, at the Time he engaged. He took the Risque, upon a Supposition that what was usual or necessary, *would* be done.

It is absurd to suppose, when the *End* is insured, that the *usual Means of attaining it* are meant to be *excluded*.

Therefore, when Goods are insured “ *till landed* ;” without *express* Words, the Insurance extends to the *Boat*, the *usual Method* of Landing Goods out of a Ship, upon the Shore.

If

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If it is *usual* to stay so long at a Port, or to go out of the Way, the Insurer is considered as *understanding that Usage*. *Bond v. Gonzales*, 2 Salk. 445. was so ruled by Ld. Ch. J. Holt.

If Goods are insured on Board *one* Ship, to a Port; and from thence, on board *another* Ship, the first that can be got; The Insurance *extends* through *all the intermediate Steps* of removing from one Ship to the other, *as usual*. * For the *Means* must be taken to be insured, as well as the *End*.

All this has been determined in the Case of *Tierney v. Etherington* at *Guildhall*, 5th March 1743. That was an Insurance on Goods in a *Dutch* Ship, from *Malaga* to *Gibraltar*, and at and from thence to *England* and *Holland*, both or either; on Goods as here under agreed; beginning the Adventure from the Loading, and to continue till the Ship and Goods be arrived at *England* or *Holland*, and there safely landed.

The Agreement was “That upon the Arrival of the Ship at *Gibraltar*, the Goods might be *unloaded*, and *reshipped* in one or more *British* Ship or Ships, for *England* and *Holland*; and to return One *per Cent.* if discharged in *England*.”

It appeared on Evidence, that when the Ship came to *Gibraltar*, the Goods were unloaded, and put into a *Store-Ship*, (which it was proved was always *considered as a Warehouse*;) and that there was then *no British* Ship there. Two Days after the Goods were put into this *Store-Ship*, they were lost in a Storm.

* P. 349. * For the Defendant, it was insisted that the Insurance was only upon the *Dutch* and *British* Ships; and that it did *not extend* to the *Store-Ship*; which is considered *as a Warehouse at Land*, and *so not a Peril at Sea*.

For the Plaintiff, It was insisted, That this was a Loss *in the Voyage*: For the Policy is, for all Losses *at Gibraltar*, as well as to and from. If there had been a *British* Ship there, and the Goods had been put into a *Lighter*, in Order to go to the *British* Ship, and lost in the way; That would have been a Loss within the Policy. We have Liberty to unload and reship; and therefore have a Liberty to use all the *Means* in Order to do that.

LEE, Ch. J. said—It is certain, that in Construction of Policies, the *strictum Jus*, or *Apex Juris* is not to be laid hold on: But they are to be construed largely, for the Benefit of Trade, and *for the Insured*. Now It seems to be a strict Construction, to *confine* this Insurance only to the unloading and reshipping, and the Accidents attending

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attending that Act. The Construction should be *according to the Course of Trade in this Place*. And this appears to be the *usual Method* of unloading and reshipping in that Place: *Viz.* "That " when there is no *British Ship* there, then the Goods are kept in " Store-Ships."

He added, that where there is an Insurance on Goods on Board such a Ship; *that Insurance* extends to the carrying the Goods to Shore, in a *Boat*. So if an Insurance be of Goods to such a *City*; and the Goods are brought in Safety to such a *Port*, though distant from the City; That is a Compliance with the Policy, if that be the *usual Place* to which the Ships come.

Therefore as here is a Liberty given of unloading and reshipping, It must be taken to be an insuring the Goods under *such Methods* as are *proper* for the unloading and reshipping. Here is no Neglect on the Part of the Merchant, (the Insured :) for the Goods, were brought into Port the 19th and were lost the 22d of *November*.

This Manner of unloading and reshipping is to be considered as the *necessary Means* of attaining that which was intended by the Policy; and seems to be the same as if it had happened in the Act of reshipping from one ship to the other. And *as this is the known Course of Trade*, it seems extraordinary if it was not intended.

This is *not* to be considered as a *Suspension* of the Policy, during the unloading and reshipping from One Ship to another. For, as the Policy would extend to a Loss happening in the unloading and * reshipping from One Ship to Another, so any *Means* to attain that * P. 350. *End* come within the Meaning of the Policy.

And accordingly, a Verdict was given for the Plaintiff.

In the *Easter Term* following, a new Trial was moved for: But it was refused, by Lord Ch. J. *Lee*, Mr. Just. *Chapple*, and Mr. Just. *Denison*; Mr. Just. *Wright* indeed being of a different Opinion; namely, "that it was a Removal at the Peril of the *Insured*."

So in the present Case, the same reasoning will hold. And, in general, What is *usually* done by such a Ship, with such a Cargo, in such a Voyage, is understood to be *referred to* by every Policy; and to make a *Part of it*, as much as if it was *expressed*.

The *Usage*, being *foreseen*, is more strongly allowed to be done, than what is left to the Master's Discretion upon *unforeseen* Events: Yet if the Master, *ex justâ Causa*, goes out of the Way, (as, to refit, or to avoid Enemies, Pirates &c,) the Insurance *continues*.

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Upon these Principles, It is difficult to frame a Question which can arise out of this Case, as stated.

The only Objection is, "That they were burnt in a Bank-Saul
" and *not in the Ship*; upon *Land*, and *not at Sea* or upon *Water*;
" and, being appertinant the *Ship*, Losses and Dangers *ashore* could
" not be included."

The Answer is obvious. (1st.) The *Words* make no such Distinction. (2dly.) The *Intent* makes no such Distinction.

Many Accidents might happen at Land, even to the Ship.

Suppose a Hurricane to drive it a Mile on Shore. Or an Earthquake may have a like Effect. Suppose the Ship to be burnt in a dry Dock. Or suppose Accidents to happen to the Tackle upon Land, taken from the Ship, while accidentally and occasionally refitting; as on Account of a Hole in it's Bottom, or other Mischance.

These are possible Cases. But what might arise from an *accidental* Occasion of refitting the Ship, is not near so strong as a *certain necessary* Consequence of the *ordinary* Voyage, which the Parties could not but have in their direct and immediate Contemplation.

Here, the Defendants *knew* that this Ship *must* be heeled cleaned and refitted, in the River of *Canton*. They *knew* that the Tackle &c, *would* then be put in the Bank-Saul. They *knew* it was for the *Safety* of the Ship, and *prudent*, that they *should* be put there.

* P. 351. * Had it been an *accidental Necessity* of refitting, the Master might have excused taking them out of the Ship *ex justâ Causa*. But Describing the Voyage is an *express Reference* to the usual Manner of making it, as much as if every Circumstance was mentioned.

Was the Chance varied by the *Fault* of the Master? It is impossible to impute any *Fault* in him.

Is this like a *Deviation*? No: 'Tis *ex justâ Causa*; Which always excuses.

And yet Sir *Richard Lloyd*, being pressed in his Argument, was obliged to insist "that it resembled a *Deviation*: Which determines the Insurance, and discharges the Insurer."

Answer. This Supposes the Parties to insure from *London* and back again, knowing that the Policy would be determined in the River

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River of *Canton*: Which would be absurd. Besides, it ought to make a difference in the Premium: Yet the Under-Writers have All kept the Premium upon other *China* Voyages.

One Objection was formed by comparing this Case to that of changing the Ship or Bottom, on board of which, Goods are insured: Which the Insured have no Right to do.

Answer. *There*, the identical Ship is essential: For *that* is the Thing insured. But that Case is not like the present.

Another Objection was, "That Policies ought to be construed *strictly*, and *not* to be extended to *Cases omitted*:" (Which latter Position is true; and must be agreed.)

Answer—But that is not the present Case: For this is not a *Casus omisus*; but clearly within the View and *bona fide* Intent of the Policy.

The Case of *Fitzgerald v. Pole* is no way applicable to the present. The Question there was, "Whether it was a partial, or a total Loss, within the Meaning of the Policy." In that Case, there was Nothing fixed by Usage, or by known and established Construction, (as there is in this Case:) So that no Inference can be drawn from that Case, concluding to this.

Here, the Defendants *knew* that the Tackle and Furniture would be put in this Bank-Saul, as the *usual, certain* Consequence of the Voyage at Sea; which *always* made it *necessary* to heel clean and * refit the Ship in the River of *Canton*. Had the Insurers been asked, * P. 352. they must, for their *own* Sakes, have insisted they should be put there, as the best and safest Method. They would have had Reason to complain, if, from their *not* being put there, a Misfortune had happened: In *that* Case, the Master *would* have been to blame, and by his Fault *would* have varied the usual Chance.

They have taken a Price for standing in the Plaintiff's Place, as to *any* Losses He might sustain in performing the *several* Parts of the Voyage; of which, *this* was *known* and *intended* to be *One*.

Therefore We (All of Us who * heard the Argument) are very clearly of Opinion, That in every Light and every View of this Case, in Reason and Justice, and within the Words Intent and Meaning of the Policy, and within the View and Contemplation of the Parties to the Contract, the Insurers ARE LIABLE to answer for this Loss. Wherefore

* Mr. Just. Wilmot was not present; being engaged in Chancery, as One of the Lords Commissioners.

Per Cur. Let the POSTEA be delivered to the Plaintiff.

Anderfon

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Anderson *vers.* George.

UPON a Rule for the Plaintiff to shew Cause “Why a *Verdict* obtained by Him for 16 *l.* should not be set aside, and “a new Trial ordered, UPON *Payment of Costs* ;”

The Case appeared to be, That the Plaintiff had sold Goods to the Defendant: Who paid for them by a Promissory Note of One *Hopley*; which the Defendant indorsed. The Plaintiff demanded the Money of *Hopley*: But indulged Him with further Day of Payment, several times; till *Hopley* broke.

The only Dispute between the Parties was, “Which of them “ought to bear the Loss of this Note.” For the Plaintiff was paid; if the Loss ought to fall upon Him, through his Neglect or Indulgence in giving further Credit to *Hopley*.

There were *two Counts* in the Declaration: One, for *Goods sold*; the Other, against the Defendant as Indorser of the Promissory *Note*.

When the Cause came on to be tried, though both Parties came to try the *real Merits* of the Question between them, *viz.* “Which “should bear the Loss of the *Note* occasioned by *Hopley*’s Failure;” And the Plaintiff’s Agents had the *Note in Court*; Yet, finding upon their own Evidence, “that the Plaintiff had given repeatedly “*further Credit to *Hopley*,” they resorted to a TRICK, and rested their Case upon proving the Sale and Delivery of the *Goods*, which never was disputed. The Defendant could not produce the *Note*: It was in the Plaintiff’s Custody. Relying upon its being the only Ground of the Plaintiff’s Case, the Defendant had not given Him NOTICE “to produce it.” The Count, stating it, could not be given in Evidence: And the Defendant had not intitled Himself to prove the Contents, for want of Notice to produce it. LORD MANSFIELD told them, at the Trial, it was an improper Artifice; That no Verdict could stand, which was so obtained. But the Plaintiff refused to produce the *Note*; and had a Verdict, of Course.

* P. 353.

It was now contended, for the Plaintiff, that the Verdict was *regular*, and the Plaintiff in *no Fault*: For, without Notice, He was *not obliged to produce* the *Note*. Therefore the Verdict ought not to be set aside.

The COURT thought the Plaintiff had taken an *unfair Advantage*, *contrary to Justice and good Conscience*. That the Rules of Practice

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Practice must be *general*: But He who abused them in a particular Case, should not shelter a *Trick*, by *Regularity*. The Plaintiff did not want Notice to produce a Note he *had in Court*, and which he had laid in the Declaration as his *Ground of Action*. Besides, He took a Verdict for the Price of the Goods; *though* he had *received Satisfaction*, the Evidence of which was in his own Custody and *suppressed*.

They not only set aside the Verdict; but set it aside *WITHOUT Payment of Costs*: And declared, “the next Time that a Party “ should obtain a Verdict in like Manner, by an *unfair unconscionable* Advantage, without trying the real Question, they would set “ aside the Verdict, and make *Him pay the Costs*.”

A new Trial being ordered, This Cause was tried at *Guildhall*, the Sittings after this Term: And the *Defendant* had a Verdict upon the *Merits*, to the Satisfaction of every Body; the Case being clear beyond a Doubt.

* *Rex vers.* Inhabitants of Bentley.

* P. 354.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 135. pa. 425.

The End of *Easter* Term 1757, 30 Geo. 2.

* P. 357.

* **Trinity Term**

30 & 31 Geo. 2. B.R. 1757.

Monday, 13
June 1757.

Rex vers. Inhabitants of Great Torrington.

See this CASE *abridged* in the TABLE; and *at large*, the Quarto-Edition of my SETTLEMENT CASES, N^o. 136. p. 428.

* P. 358.

* *V.* the next Case, *Rex vers. Inhabitants of Keynsham*: which is the same Point, and determined on the like Concession of the Adverse Counsel.

Tuesday, 14
June 1757.

Rex vers. Inhabitants of Keynsham.

See the last Case—S. P.

This CASE is also *abridged* in the TABLE; and may be seen *at large* in the abovementioned Book, N^o. 137. p. 429.

Wednesday,
15 June 1757.

Weller vers. Goyton and Walker.

ACTION against *Two*, upon a JOINT-Promise; Judgment against *Walker*, by Default; Issue joined by *Goyton*; and the Plaintiff neglected to bring it on to Trial: And the Common Rule was obtained, for Judgment *as in Case of a Non-SUIT*.

This .

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This was a Question on 14 G. 2. c. 17. §. 1. concerning the Court's giving Judgment as in Cases of Non-Suit: And it arose upon a Doubt of the Master's, "Whether He could tax Costs as in Case of a Non-Suit; as there was a Judgment by Default, for the Plaintiff, against the Other Defendant."

* Mr. *Lawson* moved for the Direction of the Court to the Master, * P. 359. that he should tax the Defendant *Goyton* his Costs, pursuant to the Rule.

LORD MANSFIELD (though no Counsel appeared on Behalf of the Plaintiff) had a Doubt, "Whether there could be Judgment AS in Case of a Non-Suit, in a Case where the Plaintiff was NOT liable to a Non-Suit." This Act of 14 G. 2. c. 17. enacts "that all Judgments given by Virtue of it, shall be of the like Force and Effect, as Judgment upon Non-Suit; and of no other;" (§. 2:) And provides "that the Defendant or Defendants shall, upon such Judgment, be awarded his her or their Costs, in any Action or Suit where He She or they would upon NON-SUIT be intitled to the same; and in No other Action or Suit whatsoever." (§ 3.) So that the Point seems to be "Whether the Plaintiff could, in this Case, have been nonsuited at the Trial." For if he could not, then the Case of a Non-Suit does NOT here EXIST: And consequently the Court cannot give Judgment and Costs, AS in Case of a Non-Suit, when the Case of a Non-Suit does not at all exist. Now here was a Judgment obtained by the Plaintiff against One of the Defendants, already: How then can the Plaintiff be out of Court as to HIM? But if he is nonsuited in this Action, He will be out of Court, as against both Defendants.

Mr. Just. DENISON seemed to think, also, that the Plaintiff would not have been liable to a Non-Suit at the Trial. And to that Purpose, He recollected and mentioned the Case of *Greeves v. Roll and Newell*; which is wrong in 2 *Salkeld* Title *Nonsuit*, pl. 5. pa. 456. *

NOTHING was taken by the Motion.

* See S. C. also, at large, in Cases in B. R. temp. W. 3. Pa. 651. (called 12th Mod.) and in 1 Ld. Raym. 716. (Both better reported.)

Hall

Trinity Term 30 Geo. 2.

Hall et Ux' *vers.* Woodcock.

Trin. 1756. 26, 30 G. 2. Rot'lo 921.

(Lord Commissioner Wilmot absent in Chancery.)

ERROR to reverse a Common Recovery. The Error assigned was—"that the Vouchee, before the Rendering of the Judgment, died without Issue." Upon the *Scire facias* previously issued against the Demandant in the Writ of Entry and against the Terretenants, &c, who were returned to have been summoned, &c,
* P. 360. * and thereupon Errors assigned; Lucas, the Demandant, comes in and pleads "That there is no Error:" And one of the Terre-Tenants suffered Judgment by Default. But Woodcock who was also one of the Terre-Tenants, prays Oyer of the *Scire facias*; and pleads "NON-TENURE, and that Henry Balguy and his Wife are the Terre-tenants;" And prays JUDGMENT ON THE SCIRE FACIAS. To this Plea there is a Demurrer, by the Plaintiffs in Error; and a Joinder in Demurrer, by Woodcock the Terre-Tenant.

Serjeant Poole for the Demurrer, viz. for the Plaintiffs in the *Scire facias*, and in Error.

The *Scire facias* which issued against the Terre-tenants is not *ex Necessitate*, nor *ex Debito Justitiæ*; but only discretionary in the Court, and only to see if the Terre-tenant has a Release of Errors: But the Terre-tenant can not plead "Non-tenure," and "that another Person was Tenant of the Freehold, at the Time of the issuing of the *Scire facias*." That Other may as well plead (in like Manner) to another *Scire facias* to be issued against him, "that a THIRD Person is Tenant of the Freehold;" and so on. And the Terre-tenant's Title will not be affected by this Judgment and Recovery: For an *Ejectment* must be brought. The Terre-tenant cannot plead in Abatement of the Writ of Error; but only in Bar of it. 1 Lev. 72, 130, 146. *Winn v. Lloyd* is so. 1 Siderf. 213. S. C. 1 Keb. 54, 351, &c. S. C. Sir. T. Raym. 15, 55. S. C. *Dyer* 321. a. is also a strong Intimation "that the Terre-Tenant can only plead in Bar of the Writ of Error." The Case of *Winn v. Lloyd* is in Point. And the present Case must be taken to be a Plea put in merely for Delay, (as that was.)

Mr. Luke Robinson contra for the Defendant Woodcock, whose Plea was demurred to. It appears upon the whole Record, that the Plaintiffs in Error have no Title: And if so, there is an End of the Matter.

As

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As to *this Plea of the Terre-tenant*, “of Non-tenure; and that “*Balguy* and his Wife are the Terre-tenants”—The Fact is *admitted* by the Demurrer: And the Plaintiffs in Error ought to have taken out a *new Scire facias* against *Balguy* and his Wife. The *Scire facias* against the Terre-tenant is of *necessity*, and *not discretionary*. For the Tenant to the *Præcipe* is merely *nominal*: But ’tis the Terre-tenant who is the *true* Tenant of the *Freehold*. And the Terre-tenant *may Plead* MANY *other Pleas besides a Release*: He may plead “that the Plaintiff has conveyed the Land to another;” or he may plead *Non-tenure*. That “a *Scire facias* against the “Terre-tenant is *strictly necessary*,” is proved by 3 *Mod.* 119. * *Kingston v. Herbert.* 3 *Mod.* 274. *Anon.* says, “that there † should be “a *Scire facias*, both against the *Heir* AND against the Terre-tenants.” (Now here is *none* against the *Heir*, at all.) *Dyer* 321. *a. b.* proves expressly, “that there *ought* to be a *Scire facias* “to the Terre-tenants before the Court proceeds to an Examination “of the Errors.” 5 *Mod.* 209. *Stokes v. Oliver.* A Writ of Error was brought to reverse a Common Recovery: And there *was* a *Scire facias* against the Terre-tenants. 6 *Mod.* 134. *Adams v. Terre-tenants of Savage*, was a *Scire facias* by the Administrator, to warn in *All* the Terre-tenants of *Savage*, (*not naming them* :) And *fo.* 199. was a Plea in *Abatement*; “That *J. S.* was a Terre-tenant of *Savage*; and was not summoned.” ‡

* P. 361.

* This Case was adjourned; and

therefore is no Authority.

† The Court there held it

not to be necessary, in

Point of Law:

But that it

was necessary, by the

Course of the Court, and

reasonable that it should be so.

‡ This Case stands also adjourned.

But *supposing* the Plea to be bad, yet there is neither *Heir* nor Terre-tenant *before* the Court. And He said He had *other* Objections too. But

LORD MANSFIELD said He had better reserve them, till he should see whether this Plea to the *Scire facias* would hold. And He asked Mr. *Robinson* Whether He had any *Authority* to prove “that the Terre-tenant could plead ANY “*Thing else BUT a RELEASE.*”

(Which Mr. *Robinson* could not produce.)

Serj. *Poole* in reply—The present Question is upon *this* Plea of the Terre-tenant. I deny that a *Scire facias* against Terre-tenants is *ex Debito Justitiæ*. However, We *have issued* a *Scire facias* against One of the Terre-tenants; who has suffered Judgment by Default. *Dyer* 321. *a.* cites the Case of *Leygbe v. Colyn & al.*, 7 *H.* 8. Error to reverse a Judgment in Affize. * The Cases in 5 *Mod.* 209. and 6 *Mod.* 134. are not applicable to the present Case: That in 6 *Mod.* 134. was in Order to bring all the Co-Terre-tenants in, to make Contribution.

* V. Dyer

65, 132, 375:

All S. P. but

not S. C.

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If they have a *Release* to plead, let them shew it: If not, 'tis plainly a Plea only for *Delay*,

* V. Carthew
111, 112,
accord'.

LORD MANSFIELD—By the * *established Method* of Proceeding there must be a *Scire facias* against the *Terre-tenants*: Otherwise, indeed, it is an *Irregularity*; but *no more*.

The *Terre-tenant* has *nothing to do with the Matter*. All that he can do, is only what ANY *Amicus Curiae* may do; viz. produce a *Release of Errors*: But he has nothing to do, *in Interest*. Therefore there ought to be a *Respond. ouster*, in this Case.

As to the *other* Objections, 'tis not proper to meddle with them yet.

* P. 362.

* Mr. JUST. DENISON concurred. This is *not* like a *Scire facias* on the * *Death* of a Party: 'Tis only a *Scire facias* against the *Terre-tenant*, who is *no Party to the Record*, and has *Nothing* to do with the Matter, in *Point of Interest*.
*[Which was the Case in 6 Mod. 134 & 199.]

In *Carthew* 111, 112. The Earl of *Pembroke's* Case, These *Scire facias*es against the *Terre-tenants* are said by Lord Ch. Justice *Holt*, to be discretionary, and “*not to be stricti Juris*; but yet to have “*been the constant and usual Course of the Court*; and therefore “*not to be departed from*.” And the *Terre-tenant can only plead a Release of Errors*; to defend his own Possession, or for the Sake of Purchasers: But he CANNOT *plead in Abatement to the Writ*, when he is *no Party to the Suit*.

* V. Raym.
55, 56. S. C.

In the Case of *Winn v. Lloyd*, the three *Terre-tenants* pleaded * three different Pleas; which were rejected as frivolous. And so is this; and ought to be rejected. And it is premature to enter into the Errors objected to in the Record: For Mr. *Robinson* is only Counsel for *Woodcock*; One of the *Terre-tenants*.

Mr. JUST. FOSTER was clearly of the same Opinion.

Here *Woodcock* comes in, and says “He has *No Interest* in the “*Land*.” Therefore he certainly cannot be heard, in Objection to the Judgment, and to shew *that* to be *erroneous*: This was no Part of the Intention of the Notice given him by the *Scire facias*. His Plea is insufficient: Therefore he ought to answer over.

Per Cur. RESPOND. OUSTER.

Far,

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Far, (Spinster,) *vers.* Denn.

ERROR to reverse a Judgment in Ejectment.

Mr. Serj. *Martin* for the Plaintiff in Error.

This was an Ejectment, wherein *Denn* was Plaintiff, and *Elizabeth Far* and *Rebeccah Savil Far* were Defendants: and Issue had been joined between the Plaintiff and *both* these Defendants. And Day was given to the Parties &c. At which Day comes as well the Plaintiff as the said *Elizabeth Far*: But the *other* Defendant *Rebeccah Savil Far*, doth *not* come. And the Sheriff doth not return his Writ.

Then the *Death of REBECCA SAVIL Far* is SUGGESTED *upon the Roll*, in the usual way. And a new *Venire* is awarded to try the Issue against the surviving Defendant *Eliz. Far*: And it is further awarded, "That all further Proceedings against *Rebeccah Savil Far* shall cease." Then it sets forth the Record of the *Postea* at the Assizes; and the Recovery against *Elizabeth Far*. And the Judgment is "That the Plaintiff recover his Term against the said *Elizabeth Far*." * P. 363.

Errors assigned—"That there is no Record of *Nisi prius*;" [which Serjeant *Martin* said, was only done, in Order to give them Opportunity of objecting to the Variances;] And "That Judgment is given for the Plaintiff below, whereas it ought to have been given for the Defendant." Then a *Certiorari* issued, to certify the Record of *Nisi prius*: Which was certified accordingly. And "*In Nullo est erratum*" was pleaded, by the Defendant in Error.

This Writ of Error was brought, He said, by the Approbation of the Court of C. B. on Consent to wave a Motion there in Arrest of Judgment. He cited *Bishop's Case*, in 5 Co. 37. b. to shew that he was at Liberty to make Exceptions *not assigned* for Error. Also 1 Salk. 268. S. P. *Carlton v. Mortagh*.

And then he proceeded to make his Objections; *viz.*

1st. The *Nisi prius Roll* is erroneous, in itself.

2dly The *Nisi prius* Record *varies* materially from the *Plea Roll*.

3dly. This may be taken Advantage of, AFTER *Verdict*.

4thly.

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4thly. The *Omission* of "*Quod querens Nil capiat per Breve*," as to *Rebeccah Savil Far*, makes the Judgment erroneous.

5thly. The *Judgment* ought not to have been for more than a MOIETY of the Lands demanded.

And First—The Death of *Rebeccah Savil Far*, One of the Defendants, ought to have been suggested *upon* the *Nisi prius* Record. It is NOT sufficient that this be mentioned in the *Jurata*-part of it. *Barnes's Notes*, Tr. 7 & 8 G. 2. C. B. Fo. 8. *Waldo v. Harrison*: Where the *Jurata* in the Record of *Nisi prius* was amended. Which was done upon the Foundation that the *Jurata*-part of the Record is *not* an Award of the Court; but *only to annex* the Proceedings. Indeed *Rebeccah Savil Far* is, in *that* Part, said to be dead: But 'tis only in a *Parentthesis*, and by way of *Recital*. However, that is *not the PLACE* for a *Suggestion* of the *Death of Parties*. And it ought to be a *full and positive* Assertion: For there are to be Proceedings upon it.

* P. 364. * If any Special Matter had been suggested, about awarding the *Venire* out of the Common Course, a Copy must have been given. 1 *Strange* 235. *Brocas v. City of London*.

This *Recital* did *not authorize the Judge* to try the Cause between One of the Parties only. There ought to be a *New Venire* awarded: Or it ought to have been awarded against *both* Defendants. For here is NO *proper Suggestion* of the Death of One of the Defendants.

The *Jurata* is wrong. 2 *Hawkins P. C.* 290.

The Death must be *suggested*. 8, 9 *W. 3. c. 11. § 7*. But a *Recital* is *no Suggestion*. And this is *not* a Discontinuance; but a *Mis-Trial*, (which is not helped by the Stat. of Jeofails.)

Secondly—This *Nisi prius* Record *varies* materially from the Plea-Roll: For it is *not* between the *same Parties*. And *small Variances* are fatal. 1 *Ld. Raym.* 329. *Doberteen v. Chancellor. Palmer* 378. *Young v. Englefield. Cro. Eliz.* 340. *Long v. Michell. Viner's Abridgment* 553. Pl. 8. of Title *Error*.

✎ Mr. JUST. FOSTER—Brother, VINER is NOT an Authority. Cite the Cases that *Viner* quotes: That You may do.

Serj. *Martin* proceeded—

Thirdly—This may be taken Advantage of, AFTER *Verdict*.

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Fourthly—The Judgment is *imperfect*, without these Words
“ *Quod querens nil capiat &c.*”

LORD MANSFIELD—Would You have it, “ That he shall take
“ Nothing by the Judgment, against a *dead* Person?” However, it is in the Entry of the Judgment, “ That further Proceedings shall stay against this dead Person.”

Serjt. *Martin*—

Fifthly—The Judgment ought *only* to have been for a *Moiety* of the Premises. My Argument arises on 11 G. 2. * * See c. 19.
And here *might* have been two *separate* Records. *Both* are made Defendants by the Rule. It is said in 1 *Ventr.* 355. If every One do not appear, the Plaintiff cannot proceed against the Rest. And though Ejectments be the Creatures of the Court, Yet the Records must preserve as *regular a Form* as other Records must: And so it is, even upon Common Recoveries.

* LORD MANSFIELD—If it be wrong, to award the Recovery of * P. 365.
the Term against the Tenant in Possession, how would You have *had* it awarded? For it might have been very inconvenient to award it in *Moieties*.

Serj. *Martin*—Perhaps, the *proper* Method may be, to apply to the Court where the Judgment is, “ that the *Execution* should be
“ taken out, of such Part only as was the Possession of the *living*
“ Defendant.”

Serj. *Hewit contra*—

First,—The *Nisi prius* Record is perfectly right. Even before the Statute of 8, 9 W. 3. c. 11. the Death of the Party might be suggested upon the Roll. And here it is done, upon the very next Appearance Day after the Death.

My Brother *Martin* says, “ It is only done by way of *Recital* upon “ the *Nisi prius* Roll.” But it is not necessary to enter it upon the *Nisi prius* Roll *at all*; *unless* to direct the Judge, *between whom* He is to try the Issues, and that He has *Jurisdiction* to try it.

Secondly, Here is *no* material Variance: Whereas his Cases are Cases of *material* Variances. Indeed here is no Variance *at all*.

Thirdly—Here is nothing to take Advantage of.

Fourthly—The Judgment is perfect enough.

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Fifthly—The *Judgment* must be, “to recover the *Term*.” Indeed the Plaintiff must take Care to take out *Execution* for no more than He has a Right to, by the Recovery. And Many of his Objections (even if they had any thing in them,) are *cured* by the Statute.

Serj. *Martin*, in Reply, to the same Effect, as before.

Lord MANSFIELD thought there was no Difficulty in the Objections. They are reducible indeed to *three*. For the 3 first are no more than, Whether the *Judge* had Jurisdiction to try the Cause, between the Plaintiff and the living Defendant only.

Now the Suggestion, and the Award, and All the Proceedings shew *One* of the Defendants to be dead; And there is an Award for the Proceedings to *stay* as to *this* Defendant; and to go on against the *other* ONLY: And the Jury is awarded as against the
* P. 366. * living One, the Other BEING dead. Both were alive, when the Issue was joined: And it is *properly* awarded upon the Issue Roll; and acknowledged. And the *Nisi prius* Roll is only for the *Direction of the Judge*, to try it: And it is not traversable on *this* Roll. And the two last Points are as plain.

The *Judgment* is right enough: And the *Execution* must be taken out according to the Right and Justice of what is *really* recovered.

Mr. Just. DENISON held it not necessary to enter and transcribe the *very* WORDS of the Suggestion, from the Plea-Roll, upon the *Nisi prius* Roll; and all the Continuances; but *only enough* to shew and notify to the *Judge*, what Issues he was to try, and between whom. It is as properly put in here, in the *Jurata*, as any where else: And it could *not* be traversed on the *Nisi prius* Roll. And here is *no Variance*; but only an *Omission* of what was *unnecessary* to be put in. And there was no Need of the “*Querens nil capiat per Breve* :” there is *sufficient* without it.

And as to the 5th Exception—They *might* be *Joint-tenants*; and then 'tis strictly right. But if not, the Plaintiff recovers *his Term*: And he must take Care not to take out *Execution* for more than he had right to recover.

Mr. Just. FOSTER was very clear in concurring.

Per Cur. unanimously

JUDGMENT affirmed.
I Ball,

Trinity Term 30 & 31 Geo. 2.

Ball, qui tam, *vers.* Cobus.

Saturday,
18 June 1757.

MR. *Whitaker* shewed Cause against quashing an Information *qui tam*, for exercising the Trade of a Baker at *the Parish* of *Speldhurst* in *Kent*, not having served an Apprenticeship; contrary to 5 *Eliz. c. 4*.

The 1st Objection taken to this Information, by Mr. *Clayton*, on the Original Motion, was “That *Speldhurst* does not appear to be “a City, Market-Town or Corporation: It may be a VILLAGE.” For supporting which, He had cited 2 *Keble* 583. *Rex v. French*; (1st. Exception.) which Case is also reported in 1 *Mod.* 26. S. C. *Rex v. Turnith*; and 1 *Ventr.* 51. S. C. But though these are all Reports of the same Case (which was cited by Mr. *Clayton*, only out of *Keble*;) Yet Mr. *Whitaker* alledged that they are inconsistent with each other.

* Mr. *Clayton contra*—The Act was intended *merely* for the Benefit of Corporation: And it has * always been taken, “that it does * P. 367.
“not extend to any Village, or any Place less than a City, Market- * Rainsford
“Town, or Corporation.” And it would be extremely *inconve-* otherwise, in
nient to the Inhabitants of all distant retired Villages, if it did. 1 *Mod.* 26.

LORD MANSFIELD—The Question is *not* now upon the *Evidence*; but upon the LAYING the Offence. Have You any Authority, that it may not be *laid* at a *Parish*?

Mr. *Clayton*—None but that in *Keble*; (*viz.* 2 *Keb.* 583.)

LORD MANSFIELD—There is nothing in the Act, that restrains it to be LAID in a City, Market-Town, or Corporation: And this *Laying* it in a *Parish* will *not affect the EVIDENCE*.

Mr. Just. DENISON expressed Himself in Terms exactly to the same Effect.

Mr. Just. FOSTER—Many Trades are carried on in *Villages*: Most of the *Cloth-Trade* in *Yorkshire*, is carried on in the *Villages*.

Mr. *Clayton* offered another Objection; *viz.* That it was not averred “that he did not *then* exercise the Trade,” (namely, at the Time of making the Act.) But

THE

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THE COURT (without any Hesitation) over-ruled this Objection. So that, (Both Objections being over-ruled.)

THE RULE “to shew Cause why the Information should not be quashed,” was DISCHARGED.

Tarrant *vers.* Haxby.

MR. Norton and Mr. Winn moved for a *Prohibition* to the Consistory Court of York, to stay their Proceedings against Tarrant the present Parish-Clerk of St. Osith in York; which Proceedings were there instituted at the Instance of Haxby the deprived PARISH-CLERK, for the *Restoration* of the said Haxby.

* P. 368. The Office of Parish-Clerk is of a TEMPORAL Nature: And the Fees are of TEMPORAL Cognizance. There are two Cases in Sir J. Strange's Reports, to this Purpose; V. 2 Strange 942. Peak v. Bourne; and 2 Strange 1108. Pitts v. Evans C. B. And there is an express Case in 2 Brownl. 38. Gaudye's Case with * Dr. Newman, C. B. P. 8 Jac. 1. That the Office of Parish-Clerk is Lay; And the Spiritual Court have no Jurisdiction concerning his Deprivation.

This Haxby, they said, was deprived by the Parson and the whole Parish, for Drunkenness during Divine Service, and other Misdemeanors: Whereupon, the Parson appointed Tarrant in his Room, Against whom, Haxby libelled, in the Consistory Court of York; Where there was a Monition; and they were proceeding to restore Haxby. And all this was suggested. Upon which, a Rule was granted, to shew Cause. And now Mr. Nares was to have shewn Cause: But, being satisfied that it was too strong against Him, He would not trouble the Court. Whereupon,

The RULE for the PROHIBITION
was made ABSOLUTE.

Monday, 20
June 1757.

Rex *vers.* Inhabitants of Uffculme.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT CASES, N^o. 138. p. 43^o.

* Rex

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* *Rex vers.* Inhabitants of Milwich.

* P. 371.

Monday, 20
June 1757.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 139. pa. 433.

Harris vers. Huntbach.

* P. 373.

Tuesday, 21
June 1757.

THIS was a Cause in the Civil Paper; and came before the Court, upon a Case reserved for the Opinion of the Court, in an Action upon a *general Indebitatus Assumpsit*, in which the Plaintiff declared upon two Counts; The 1st of which was for Money lent and advanced by the Plaintiff, at the Defendant's Request; The 2^d was for Money laid out and expended by the Plaintiff, at the Defendant's Request: And the Question upon the Case stated, was "Whether the Evidence supported the Declaration."

The Case stated—1st. That a Note of the Defendant's was produced in Evidence by the Plaintiff in the following Words: "3^d December 1751. Then received of Mr. *Harris* the Sum of "19 *l.* on the Behalf of my Grandson: Which I promise to be "accountable for, on Demand. Witness my Hand *S. Huntbach*." This Evidence was produced in Support of the first Count.

On the 2^d Count—The Evidence was, that One *Davidson* coming to the Plaintiff, by the Defendant's Order, for Money to pay Workmen, the Plaintiff refused to pay the Money, unless the Defendant would sign a Receipt. Whereupon the Defendant wrote the following Note, *viz.* "Mr. *Harris*, At the earnest Request of "the Gardiner, the workmen wanting money greatly, for the "Work at the Woodhouses, This is to certify that it is *My Request* "that You pay to Mr. *Davidson*, on the Account of Master *Hil-* "lier, for the Workmens Use the Sum of 15 *l.* As Witness my "Hand *S. Huntbach*." And a Receipt was given by the said *Davidson*, the Gardiner, to the Plaintiff, on the Plaintiff's paying him this 15 *l.* Verdict for the Plaintiff—Case saved upon this Question, *viz.* "Whether the Evidence was sufficient to support the "Verdict."

Mr. *Aston* for the Plaintiff—The first Count is for Money lent 1st. and advanced by the Plaintiff, at the Defendant's Request. And

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here is a Note under the Defendant's Hand produced, acknowledging the Receipt of it, and promising to be *accountable* for it: Which is tantamount to a Promise to *PAY* it. And it's being added, "*on the Behalf of my Grandson,*" makes no Difference: For

* P. 374. * There is *no Remedy* against the *Infant*. Therefore it is an *Original*, not a *Collateral Undertaking*. In 2 *Ld. Raym.* 1085. *Buckmy v. Darnall*, It is agreed "That where no Action will lie against the " Party himself, Undertaken for, it is an *Original Promise*." In the Case of *Reid v. Nash*, *M.* 24 *G.* 2. *B. R.* and *Tr.* 1751, 24 & 25 *G.* 2. It was settled accordingly. And here is *no Remedy against the Infant*, upon this Note.

2d. 2d Question. Whether the other Evidence above stated was sufficient to maintain the 2d Count.

Now the Plaintiff could not have maintained an Action against the Infant, for *this* Money, no more than for the former. The Plaintiff refused to advance it, till the Defendant wrote thus, "It is " *my Request* that You shall pay, on the Account of Master *Hillier*, " to Mr. *Davidson*, to the Workmens Use, 15 *l.*" And this is an *Original Undertaking* "that the Defendant will pay the Money: And it was advanced on the Account and Credit of the Defendant.

Mr. *Nares contra* for the Defendant—

The Question is, how far a general *Indebitatus Assumpsit* will lie, upon these Facts, and the Evidence brought to support them. This is a general *Indebitatus Assumpsit*: And *Indebitatus Assumpsit* does not lie, but when an Action of *Debt* will lie. 1 *Salkeld* 23. *Hard's Cases* is expressly so. 2 *Ld. Raym.* 1034, 1035. *Smith v. Ayrey*: "*Indebitatus Assumpsit* does not lie for Money won at Play." 1 *Strange* 680. *Welch v. Craig*: "It does not lie on a Promissory Note." No more will it, upon a *Collateral Undertaking*. And therefore the present is *not a proper Count*, if the Evidence would support it. This cannot be considered as *Money lent*. It cannot be more than Evidence of a *Collateral Promise*. And why will not an Action lie *against the Infant*? I think it *will*. And then it is exactly within the Cases of *Buckmyr v. Darnall*, in 2 *Ld. Raym.* 1085; and *Reid v. Nash*, Where *Nash* promised to pay 50 *l.* if the Plaintiff would withdraw his Record; (Which was indeed an *Original Promise*.)

2d. Secondly, on the 2d Count—The Note only imports a *Certificate* "that the Money is *proper* to be paid." No general *Indebitatus Assumpsit* will lie upon this. Here is no Evidence of *Money lent*.

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Mr. *Aston*, in Reply—

1st. A Note of Hand acknowledging the Receipt, and promising to be accountable, is certainly Evidence of Money lent. And it is every Day's Experience, that Notes of Hand are given in Evidence * P. 375. upon *General Indebitatus Assumpsits*. And as to inserting "on Behalf of my Grandson" it makes no Sort of Difference. 2 *Strange* 955. *Thomas v. Bishop*—The Addition of "Cashier to the York Buildings Company," was holden to make no Difference. And there is no Privity between Mr. *Harris* and the Infant: Nor will any Action lie against Him.

This is *not* a Promise in Aid, or a Collateral Undertaking; but a sole, absolute, Original Promise. Therefore He prayed that the *Posse* might be delivered to the Plaintiff.

LORD MANSFIELD—

The Question is Whether there be Evidence of a Debt contracted by the Defendant, payable to the Plaintiff.

The Declaration consists of two Counts, for two different Debts. And there cannot be clearer Evidence, than the first Note is, of the former Debt. And as to the 2d—Here is a Mansion-House belonging to an Infant: Which Mansion-House has a Garden belonging to it. It might *not* be necessary (in regard to the Infant's Situation and Circumstances) to support this Garden, (which might be a Pleasure Garden :) And no Action will lie against the Infant but for Necessaries. It don't appear at all, that there could be any Remedy against the Infant.

You can bring an *Indebitatus Assumpsit* for the Debt; and give the Note in Evidence: And surely, it supports the Declaration.

This is said to be a Collateral Undertaking. But the Argument about Original or Collateral Undertakings, depends merely upon the Want of sufficiently defining the Terms "Original" and "Collateral:" Otherwise, there can be no Doubt about them. This is clearly an Original Undertaking. And the Jury have found these Notes to be sufficient Evidence of the Debt: And it is indeed a Matter of Fact, rather than of Law.

Mr. Just. DENISON concurred.—

Surely,

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Surely, This Note is *Evidence* of Money lent. And between the Plaintiff and Defendant, this is certainly an *Original Undertaking*: And the Money was paid at the *Defendant's Request*. And there is no Privity between the Plaintiff and the *Infant*. The Case of *Reid v. Nash* is, in some Measure, like this. * Here is Nothing like a Collateral Request or Promise: 'Tis an *Original Undertaking*.

* [And that Case was determined upon mature Consideration.]

* P. 376. * Mr. Just. FOSTER likewise concurred.—

The *Infant* was *not liable*, and therefore it *could not* be a *collateral Undertaking*. It was an *Original Undertaking* of the Defendant, to pay the Money.

Per Cur'. Let the POSTEA be delivered to the PLAINTIFF.

Hammond *vers.* Brewer.

THIS was a Case for the Opinion of the Court, from the *Suffex Affizes*, before Mr. Baron *Smythe*.

The Case states, that an Act of Parliament was made in 26 G. 2. (c. 54.) for repairing and widening the Road from *Flimwell Vent* in the Parish of *Ticehurst* in the County of *Suffex*, to the Town and Port of *Hasting* in the said County: And it states many other Matters not worth nothing; as the single Question was “Whether the TOWN of *Battel* was meant to be *included* or *excluded*.”

The Question arose upon that Part of this Turnpike-Act which gave Directions for repairing the Road *to* and *from* the Town of *Battel*; which Town was stated to be lately *paved*, before the Act of Parliament, by the Inhabitants; and that it was *kept in repair by them*, and *is now so*.

Note, In many other Parts of the Act, the Roads are described as leading from *to* and *THROUGH* such and such Towns: But when it mentions the Town of *Battel* it only says “*to* and “*FROM* it,” but *omits* the Word “*THROUGH*.” And the only Question was “Whether the Act intended to *INCLUDE* or “*EXCLUDE* the Town of *Battel* itself.”

Mr. *Knowler* was for the Plaintiff (of whom the Toll had been taken :) And Mr. *Harvey*, for the Commissioners, (the Defendant having acted by their Authority;) who had set up a Turnpike in the *very Heart* of the Town.

The

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The COURT were clear that the Act of Parliament intended to EXCLUDE the Town of *Battel*; And that it was right and reasonable that it should be excluded.

And LORD MANSFIELD observed that it was neither usual nor convenient to erect Toll-Gates in the *Middle* of great Towns; * (Which these Commissioners had done:) Which might *obstruct* * P. 377. the necessary Intercourse amongst the Inhabitants; or even hinder an Inhabitant from sending his *Horses to Water*, without paying the Toll. Therefore They Ordered the

POSTEA to be delivered to the PLAINTIFF.

Rex *vers.* Manning.

Wednesday
22d June
1757.

MR. *Aston* shewed Cause against quashing an Order of Sessions made upon a Road-Act of 29 G. 2. c. 57.* (for enlarging * Qu. The Chapter. the Terms and Powers granted by former Acts:) Whereby the Surveyor of the Highways beyond *Sheppard Shord* and the *Devizes* &c, is authorized and impowered to dig Gravel &c, or other Materials &c, in upon or out of and from all and every the Lands Fields or Grounds in the Occupation of *John Manning* in the Parish of *All Cannings* in the County of *Wilts*.

The Substance of the Order was as follows—It begins with reciting the Act of 29 G. 2. c. 57.* empowering the Surveyor or Survey- * Quare. ors of the Highways or Roads therein specified, or any other Person or Persons appointed by him or them, (having first an Order from the Quarter-Sessions; *Six Days Notice, in Writing*, of the Application for such Order, being first given by the Surveyor or Surveyors, to the OWNER OR OWNERS, Occupier or Occupiers of the Lands and Grounds then intended or purposed to be cut digged or gathered for Materials for repairing and amending the Highways or Roads, or left at his or their Places of Abode;) to cut dig gather take and carry away any Furze Heath Gravel Sand or other *Materials proper and sufficient* for repairing of the said Highways or Roads, (if such Materials cannot be had or found in or upon any Waste or Common Grounds in any Parish Town or Place adjoining to or lying near the same Highways or Roads,) in upon or out of and from ANY *Lands, Fields or Grounds or either of them* (Not being a Yard Garden Orchard Park Paddock Wood Coppice Nursery or inclosed Ground planted with any Walk or Walks of Trees or Avenue to any House;) Paying such Rates for such Materials, or for the Damage done to the OWNERS AND Occupiers of the Ground

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where any and from whence the same shall be cut digged gathered taken and carried away, or over which the same shall be carried, *as the SURVEYOR or SURVEYORS, or OTHER Person or Persons* by them appointed or to be appointed by Virtue of the said former Acts or the said recited Act, for that Purpose, shall *think reasonable*.

* P. 378. Then the said Order of Sessions recites, That Application had been made to that Court, *by THE Surveyor* of the said Highways or Roads, for an Order to cut dig gather take and carry away Furze Heath Stones Gravel Sand or other Materials proper and sufficient for repairing of the said Highways or Roads, in upon or out of and from ALL and EVERY the Lands Fields and Grounds *now in the Occupation of John Manning* of the Parish of *All Cannings* in the said County of *Wilts* Yeoman, (not being a Yard Garden Orchard Park Paddock Wood Coppice Nursery or inclosed Ground planted with any Walk or Walks of Trees or Avenue to any House.)

Then the Order goes on thus—

And the said Surveyor having made and given *full Proof* to this Court “that *six Days Notice in Writing*, of his intended Application to this Court for such Order, hath been given by Him “TO the said JOHN MANNING, or left at his Place of Abode;” And the said JOHN MANNING, in Consequence thereof having offered to this Court by his Counsel, Reasons against such Order being made; and endeavoured to support the same by Proofs, (*Which Reasons and Proofs this Court ADJUDGE to be very insufficient;*) And the said Surveyor also having made and given *full Proof* to this Court, “that PROPER and SUFFICIENT Materials for repairing of “the said Highways or Roads *cannot be had or found* in or upon “any Waste or Common Grounds in any Parish Town or Place “adjoining to or lying near the same Highways or Roads.”

THIS COURT doth therefore, in pursuance and by Virtue of the said recited Act of Parliament unanimously Order that the said Surveyor of the said Highways or Roads, or ANY other Person or Persons by Him appointed and employed, may, And He and they is and are (by virtue of the said Act of Parliament and by virtue hereof) authorized and impowered to cut dig gather take and carry away any Furze Heath Stones Gravel Sand or other Materials *proper* and sufficient for repairing of the said Highways or Roads, in upon or out of and from ALL and EVERY the Lands Fields or Grounds *in the Occupation of the said John Manning, in the said Parish of All Cannings*, (not being a Yard Garden Orchard Park Paddock Wood Coppice Nursery or inclosed Ground planted with any Walk or Walks of Trees or Avenue to any House,) *Paying*
SUCH

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SUCH Rates for such Materials, OR for the Damage done to the Owners OR *the said Occupier* of the said Lands where any and from whence the same shall be cut digged gathered taken and carried away, AS *the said ACT OF PARLIAMENT* herein before in Part recited DOTH DIRECT AND PRESCRIBE.

* Mr. Norton's Objections to this Order upon making the Original * P. 379.
Motion, were only *two*:

1st. That there ought to have been *Notice to the OWNER*, as well as to the Occupier of the Land wherein the Gravel was to be dug: Although He owned, that the strict *Words* of the Act had not the *Copulative*, but only the *Disjunctive*; viz. upon Notice, &c, "to the Owner *or* Owners, Occupier *or* Occupiers of the Land, " &c." Yet, He said, that Justice required, that the OWNER *should have Notice, as well as the Occupier*; when *his Property* is to be so *materially affected*: And He argued this to be the *Intention* of the Act. And 'tis frequent, in such Cases, to understand *negative* Conjunctions, AS *Copulative*.

2dly. The *Satisfaction* is directed by the Act to be made *both* to Owner AND Occupier: Whereas they have here awarded NONE at all to the *Owner* of the Land, who is the Person principally injured. Upon this Motion, a Rule was made to shew Cause. After which, 9 additional Objections were given in, in Writing.

Mr. Aston shewed Cause why the Order of Sessions should not be quashed.

1st. Objection (given in in Writing) is, that the *Name* of the Surveyor who applied for the Order is not mentioned.

Answer—That is *Not Necessary*.

2d. Objection. That the Sessions have *not* ADJUDGED "That six Days *Notice* in Writing was given to any Person, of the intended Application:" The Words are only, "The Surveyor *having* made and given full Proof to this Court," that such Notice was given.

Answer—That it *does appear*: But if not, yet it is *not necessary*.

3d. Objection. That the Fact of such Notice being given, is *not sufficiently set forth*; it being only said "That such Notice was given to Manning, OR left at his Place of Abode."

Answer—That that is sufficient.

4th.

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4th. Objection: (which was Mr. *Norton's* first.) It is not set forth that six Days Notice in Writing of this intended Application was given to the OWNER of the Lands.

Answer. Notice to the OCCUPIER is enough. So, on a Distress—Notice may be given *either* to the Tenant *or* to the Owner * of the Goods. 4 *Mod.* 390. *Walter v. Rumball* is so holden by the * P. 380. Court. [*pa.* 395.] And here the Owner may perhaps *not* be intitled: For the Act says, “That the Damages, *if any*, &c.” Besides, the Owner may be at a vast Distance from the Land. And here the *Tenant appeared*, and made what Defence he thought proper.

5th. Objection. That the Sessions have *not expressly* ADJUDGED “That proper and sufficient Materials for repairing the Highways were NOT *to be found in any Waste or Common Ground in any Place near the said Highway:*” For it is only said, “The Surveyor *having* made and given full Proof to the Court, that, &c.”

Answer—The Order is agreeable to the Act of Parliament: And it specifies “that *full Proof* was made and given to the Court, of this Fact.”

6th. Objection. That it is not set forth “That no *proper Materials* AT ALL, for repairing the Highways, are to be found in any such Waste or Common Ground:” But only (in loose and general Words) “That PROPER and SUFFICIENT Materials for such Purpose are not to be found there.” Notwithstanding which, It is ordered, “that the Surveyor shall cut and carry away ALL *Sorts* of Materials necessary for the Repair of the *whole Road.*”

Answer—That it is exactly agreeable to the Act.

7th. Objection. *Non constat* that any Materials proper for such Purpose ARE TO BE FOUND *in any Part* of these Grounds.

Answer—That must depend upon *Trial*. The Lands are to be “cut digged, and gathered *for* Materials.”

8th. Objection. 'Tis not set forth *how far* these Grounds *lie from the Highway*; nor *to what Distance* all *waste* Grounds have been found barren of proper Materials; nor that these Grounds are *nearer* than any *Waste* where such Materials *may* be found.

Answer—The order is worded *agreeable to the Act*: And these Particularities *need not be inserted* in it.

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9th. Objection. That the *Powers* here committed to the Surveyor are *uncertain* in every Branch thereof. For *only* that PARTICULAR *Piece* of Land which affords the Materials, is made liable by the Act. But here ALL the Grounds in the Occupation of *Manning*, (being, as he alledged, a Farm of 540*l. per Annum*) are to be dug, at the Discretion of the Surveyor. And they are also laid under a perpetual Incumbrance, or at least one that is absolutely uncertain; for * P. 381. that *no time* is prefixed at which such Grounds shall be emancipate.

Answer—This also is sufficient; being agreeable to the Act.

10th. Objection: (Which was Mr. *Norton's* Second) That *Satisfaction* for such Materials is, by this Order, awarded to the Owner OR Occupier, but *not* to BOTH; Nor is it certainly defined to *which* of them: Whereas the Act of Parliament is, exprefs, “Paying to “ the Owners AND Occupiers.

Answer—’Tis sufficient: The Act is disjunctive, in directing the Notice; and must here be taken *disjunctively* and *respectively*.

11th. Objection. That the RATE of such *Satisfaction* is estimated in the Order, only as for the *Value of the Materials* which shall be cut or carried out of these Grounds; OR for the *Damage done thereby*; but *not* as for BOTH, as it ought, in Justice, to be: nor is it certainly defined, for WHICH of the two, the Compensation is to be made.

Answer—’Tis in the *Words* of the Act.

Mr. *Norton* and Mr. *Thurlow*, in Reply, supported the eleven Objections; And urged that these summary Authorities given to Justices, to the Detriment of the Liberty or Property of the Subject, ought to be STRICTLY *pursued*: And they cited many Cases, of what they apprehended to be similar Instances, or at least proceeding upon the same Principles. Whereas in the present Case, the Justices have not (as they alledged) given themselves *Jurisdiction*, by any ADJUDICATION of the necessary Facts: but have *only recited the EVIDENCE* of them.

Lord MANSFIELD—said this Order was very ill penned; and the Justices ought undoubtedly to pursue their Authority: But however, He did not agree to *all* the Objections; and particularly to the * 2d. and † 5th. which are founded upon a supposed Necessity that there must be *exprefs Adjudications*; where the Recitals and Allegations are sufficient, and where Conclusions are actually drawn.

* † The 2d. and 5th. of those given in Writing.

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As to the 4th Objection—He did not think that the Act could mean that it should *always* be necessary to give *Notice to the Owner*; Which might be impossible.

But as to the 6th and 7th Objections—It is *necessary to shew* that there were no proper Materials to be found in or upon the Wastes or Common Grounds *near the Highway*. Which is *not done* here.

* P. 382. * And they are not warranted to dig in the private Soil for *ALL the Species* of Materials; *because some of these Species* are not to be found in or upon the said Wastes or Common Grounds. They ought to *SPECIFY* what *can* NOT be found in or upon the *Wastes* or Common Grounds; and what *may* be found *in the private Soil*. And they can *not* dig, to *TRY* for it, in the *private Soil*: They should previously *know* that it is to be found there; or *at least*, have a reasonable Prospect of finding it there.

9th. And they cannot make this *general Order* “to dig over *ALL the Estate*,” and leave this to the *Discretion of the Surveyor*: They ought to *fix* upon the *particular Part*; to determine this *themselves*, and not leave it to their Surveyor. *THIS Objection is FATAL.*

10th. So also is that of the *Satisfaction*: For the *SATISFACTION* *ought to be awarded* to the Owner, or to the Occupier, or to Both; *ACCORDING to the DAMAGES* sustained by the One, or by the Other; or by Both.

Perhaps some *other* Objections might hold: But however, here is *enough*, that I have *already* mentioned.

Mr. Just. DENISON—It is a very imperfect Order, and liable to many Objections.

As to the 2d, 3d, 5th, 6th, and 7th, Objections—An *express and direct* ADJUDICATION may *not* be necessary: But many of these Foundations or their Authority ought, *some how or other*, to *APPEAR upon the Face* of the Order. Particularly, it ought to appear that *Notice* was given of the Intention to dig in some *particular Place*: For perhaps very good Cause may be easy to be shewn against it. But

9th. It can never be right to dig over *ALL the Estate*;

6th. Nor to dig in the private Soil for *such* Materials as *may be found* in the Waste.

As

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As to the 4th—NOTICE is *not* universally necessary to be given to the *Owner*: This may in some Cases be *impracticable*.

But as to the 10th. SATISFACTION ought to be made to the *Owner*, (if he be damaged,) undoubtedly.

Mr. Just. FOSTER concurred.

The Person that drew this Order, has kept to the WORDS, but *not to the SPIRIT* of the Act.

* And as to the 9th Objection in particular, undoubtedly, The * P. 383. Justices have exceeded their Power in ordering the *Surveyor to dig* over the *WHOLE Estate*: This can never be reasonable, nor within their Jurisdiction.

Pur Cur. unanimously,
RULE for quashing the ORDER
MADE ABSOLUTE.

Cogan *vers.* Ebdon and Another.

Thursday,
23d June
1757.

ON a Motion (made the 18th instant,) To *set aside a Verdict* as being given in by the *Foreman*, CONTRARY to the Opinion and Intention of *EIGHT of the Jury*.—It appeared that the Defendant justified under a Right of a Way, over the Plaintiff's Ground, to *two* Closes of the Defendant, *viz.* *Broadmoor*, and *Three-Acres*: Upon which, *two different Issues* were joined; *viz.* One, upon the Right of a Way to *Broadmoor*; the Other, upon the Right of a Way to the *Three-Acres*. And the Foreman gave in the Verdict, as a *general Verdict* for the Defendant, upon *both Issues*. But *Eight* of the Jury made *Affidavit* "That it was the
" MEANING AND INTENTION of the *WHOLE Jury*, to find the
" former Issue for the Defendant; and the *LATTER for the PLAIN-*
" *TIFF*: And that this Mistake was discovered by them, *an Hour*
" afterwards; but not till the *Judge was gone* to his Lodgings." And upon the Judge's Report it appeared that, though there was indeed Evidence on *both Sides*, yet the *Weight* of the Evidence was (as it appeared to Him) on the Side of the Plaintiff, as to this latter Issue.

N. B. The Foreman had declined making any Affidavit; because, he said, he should make himself appear a Fool, to the Court of King's Bench.

This

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This Matter was much litigated by the Counsel on both Sides. And the Counsel for the Plaintiff mentioned the Case of *Baker v. Miles*, in *C. B.* in *M. 4 G. 2. S. P.* where Eleven of the Jurymen swore "That the Foreman had mistaken their Verdict;" And it was thereupon set aside.*

* V. Viner's
Abr. Title
Trial, p. 483.
pl. 12.

THE COURT were All clear that this was a *Mistake*, arising from the Jury's being unacquainted with Business of this Nature; and from the Associate's Omission in not asking the Jury particularly "how they found *each respective Issue*," and in not making the Jury fully *understand* their own Finding; And that it was agreeable to * P. 384. *Right and Justice, that the *Mistake should be* RECTIFIED. And they had no Doubt about the *Fact* of this Mistake; from the Affidavit of the Eight Jurymen, *confirmed* (as they held it in Effect to be) by the Foreman's declining to make any affidavit at all: Especially, as the Judge's Notes shewed the Weight of the *Evidence* to have been for the Plaintiff, as to this latter Issue.

And LORD MANSFIELD and Mr. Just. DENISON thought that, as it was a *mere Slip*, there might be *some Method* of RECTIFYING *the Verdict* according to the Truth of the Case; from the Judge's Notes, if they were sufficiently particular; WITHOUT *sending* the Issue to be tried over again, at a great Expence.

And the Case of *Newcombe v. Green*, in 2 *Strange* 1197. was mentioned; where the *Postea* was amended by the Judge's Notes. And Lord Mansfield said that, at least, they could set aside the Verdict *without Costs*. But Difficulties occurring, how the Costs would be, in such Case; as *One Issue* was still found for, and was in Truth clearly for the Defendant. Therefore

CUR. ADVIS'.

And now Lord MANSFIELD, seeing Mr. *Morton* in Court, who was concerned for the Plaintiff, and had (on his Behalf) moved to SET ASIDE the Verdict, took Occasion to mention this Case; and said they had thought of it; and He had talked with his Brother * [Whose ordinary Engagements were now in the other Court.] * *Wilmot* too, about it: But, however, He was not now going to give any Opinion; but only to *propose* what seemed to Him the most *proper Method* of coming at it.

The Case of *Newcombe v. Green*, itself, is not applicable to this Case. But there is another Case, of *Mayo v. Archer*, in 1 *Strange* 514, 515. Where the Question was "Whether a Farmer who bought and sold Potatoes could be a Bankrupt:" And the Special Verdict did not set forth the *Quantities* he had bought and sold; though they were *proved at the Trial*. The Court did not there award a *Venire facias de novo*; but *amended* the Special Verdict, in that respect. Which Case is more applicable to the present Case, than

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than that which was cited: For here they Ordered the Special Verdict to be amended; though the Plaintiff's Motion was only "that a *Venire facias de novo* might be awarded."

But another Case has been mentioned to me, which is applicable to the *Principle* of this Case; though not like the particular Fact. It is that of *Dayrell v. Bridge*, Tr. 22 G. 2. B. R. Trespas for cutting down an Oak-Tree—The Defendant pleaded several Pleas; One of which was, "Not Guilty. At the Trial, a *General Verdict* was taken down, and so entered. And the Court *rectified the Verdict*, by expunging the Finding on all but the "Not Guilty;"

* It appearing that Nothing was in Question (at the Trial) but "whether the Place where the Tree stood, was parcel of the "Manor, or not." In the Case of *Newcomb v. Green*, several Cases * were cited on the same Subject: Though the Case *itself* is not the present Case.

* P. 385.

* None are mentioned by *Strange Pa.* 1197. But *Cro. Car.* 338, *Eliot v. Symp.* 1 *Salk.* 53. *Bald's Case*, and a Case of *Fry v. Horder*, in Lord *Raymond's* Time, were cited.

If the Court sets the Matter right, they should proceed according to the *whole* Truth of the Case. The Judge who tried the Cause agrees to the Fact disclosed in the Affidavit of the *Eight Jury-Men*: Whereas Your *first* Affidavit on which the Rule was made, was an Affidavit of only *Four* of them.

Therefore what I would propose is that You should make your Motion, and have a Rule to shew Cause, Why, upon Reading the Affidavits of these *Eight Jury-Men*, the Verdict should not be AMENDED and SET RIGHT, according to the *Truth of the Finding*.

Note—Such a Motion was afterwards made; and a Rule to "shew Cause" granted. But it never came before the Court any more: It plainly appearing that the Court, upon Deliberation among themselves, had come to an Opinion "that in "this Shape the Verdict *might* be set right."

Rex *vers.* Goddard Williams.

Tuesday, 28
June 1757.

MR. Nares shewed Cause (on *Wednesday*, 9th Feb. last,) against quashing a *Certiorari* to remove, from the Quarter-Sessions of the City of *London*, an Information upon 1 *Ja.* 1. c. 22. intitled "The Duty of Tanners, Curriers, Shoemakers and of others "Cutting of Leather."

Note. The Information runs, throughout, "that the Informers "give the LORD MAYOR of *London* to understand &c." But the *Certiorari* is directed to the SESSIONS of the City of *London*.

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Three Objections, he said, had been (upon the original Motion) taken to this *Certiorari*:

Obj. 1st. The *Certiorari* does *not lie*, at all.

2d. 'Tis *not well directed*. [*V. infra*, & 1 Jac. 1. c. 22. § 50.]

3d. It does *not lie*, BEFORE Conviction. 1 Salk. 145. Dr. Sands's Case. 1 Siderf. 296.

* P. 386. * Answers—

As to the 1st Objection—1 *Ld. Raym.* 469. Dr. Groenvelt's Case proves that a *Certiorari* will lie: For this Court, by *Common Law*, may issue it. 1 Salk. 148. *Crofs v. Smith*. A *Certiorari* lies to *All Inferior Jurisdictions*. 1 *Ventr.* 68. *Smith's Case* is to the like Effect. *Style* 351 & 356. in Point. 8 *Mod.* 331. * *Arthur v. Commissioners of Sewers in Yorkshire*. 1 *Hawk, P. C.* 218. § 79, 80. is very strong in Favour of *Certioraries*, where the Inferior Jurisdiction exceeds it's Authority.

[* A miserably bad Book, intitled "Modern Cases in Law and Equity."]

2dly. It is *directed* to the Justices at Sessions, *generally*. And it is right: For this is an *Act of Sessions*. 2 *Hawk. P. C.* 290. § 43. proves this Method to be right.

3dly. As to 1 Salk. 145. *pl.* 5. Dr. Sands's Case, *P. 10 W.* 3. The Reason given for the Opinion is answered by the very next Case (*pl.* 6.) in the same Book. The Case in 1 *Siderf.* 296. [There are two Cases there, in the same Page, *pl.* 19. & *pl.* 20. *Tr.* 18 C. 2. which both seem applicable to this Subject.] stands upon its own bottom. And perhaps the Method mentioned in 1 Salk. 145. *pl.* 6. was not then found out. However, notwithstanding what is there said, Yet it will lie to every *Quarter-Sessions*: And this was at the *Quarter-Sessions*.

Mr. Norton *contra*, for the Rule (to quash the *Certiorari*) agreed to put it upon 1 J. 1. c. 22. § 50. which Clause gives Jurisdiction to the Lord Mayor of *London* for the Time being, within the City, AND within Three Miles compass of it.

And this Information is here given to the LORD MAYOR, *present* (it is true) *in Court* of the aforesaid Court of Sessions: And the Informers pray the Judgment of the LORD MAYOR; though it is indeed added "*so present in the said Court*." Therefore this is NOT a Proceeding AT Sessions; but a Proceeding before the Lord Mayor pursuant to the Act.

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Note—The Caption is AS *at a Court of Sessions*: But the Information is given TO the *Lord Mayor*; And they conclude with *praying Judgment OF the LORD MAYOR, so present in that Court* [of Sessions.]

LORD MANSFIELD—The *Certiorari* has manifestly issued, as *supposing* it to be a *Proceeding* BEFORE the JUSTICES *at the Sessions*: And *they return it as such*.

* N. B. The Return is by "*Stephen Theodore Janssen Esq; Mayor*" * P. 387.
" of the City of *London*, and ALSO *one of the Justices* within
" written."

The COURT thought, the PREVIOUS Question to that of the Regularity or Direction of the *Certiorari*, depended upon the Propriety and Validity of the *Information*; viz. "Whether the *Mayor* ALONE had the Jurisdiction, under this Act;" or "the *Mayor* IN SESSIONS."

Mr. Norton— The Jurisdiction is in the *Mayor* ALONE: For He has it even for the Space of 3 *Miles out of the City*; where the Sessions have NO *Jurisdiction at all*. It is true that He has here *executed* this Jurisdiction IN Sessions.

Lord MANSFIELD and Mr. Just. DENISON were satisfied that the Propriety of the DIRECTION of the *Certiorari*, depends upon the Propriety of the Conviction: And they seemed to think that the proper Method of bringing this Question before the Court, would be for Mr. Nares to move "to QUASH the *Information*."

Mr. Nares desired to take a Day or two's Time, to consider of this, and to be better prepared for it. Whereupon it was, at present,
ADJOURNED.

And on Monday 23d May, The present Rule was *enlarged*: And also Mr. Nares (by Approbation of the Court, and of the adverse Party,) took a Rule, agreeable to the above Hint, "to SHEW CAUSE why the INFORMATION should not be *quashed*."

And now Mr. Norton and Mr. Williams being ready to shew Cause, *pro Rege*;—

Mr. Gould and Mr. Nares, for the Defendant, proposed their Objections, to the *Information*, thus; viz.

1st. That the Jurisdiction is not in the LORD MAYOR; but in the *Sessions*.

2dly.

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2dly. The Remedy is NOT *by way of* INFORMATION; but ought to be by *Indictment*.

First—They said that the Question turned upon 1 *Jac.* 1. c. 22. § 29, 32, 33, 46, 50. They insisted “That the Lord Mayor had no Authority, by this Act, to appoint Triers, where the Leather is * P. 388. “*made and manufactured *into Wares* ;” And consequently that as this Leather appeared to have been manufactured into Wares, *viz.* into Saddles, the Lord Mayor had *no Jurisdiction* to proceed in this summary Way : But that

Secondly—The Proceeding ought to have been *by Way of Indictment*; and not by way of Information, which is no Common-Law Proceeding. They added

Thirdly—

That it is uncertain before WHOM the Information is taken.

If it be understood as taken before the Lord Mayor, *He* has *no Jurisdiction*, for the Reasons abovementioned : But If it be understood as taken before the Sessions, it ought (as has been said) to have been by *Indictment*. Whereas it is a Rule, that Informations ought to be at least as certain as Indictments. So is 2 *Hawk. P. C.* pa. 261. c. 26. § 4.

Mr. Norton, Mr. Williams and Mr. Lucas, for the Prosecution—answered, That this is an Information brought by the Warden of the Sadlers Company, under this Act of Parliament, of 1 *J.* 1. c. 22. And

Answer to the 3d Objection. It is not at all uncertain ; But is an Information exhibited to the Mayor ONLY ; and prays the *Judgment* of the Mayor only.

Answer to the 1st Objection. And the Act gives him Jurisdiction, *as well* where the Leather is manufactured, as where not. And this is a Proceeding like the Informations in the Exchequer, *in Rem*, for a Condemnation.

Answer to the 2d Objection. It is *not* before the Sessions. So that this Objection of it's not being by way of Indictment is out of the Case.

Moreover, They urged that the Court would NOT *quash* such an Information, upon *Motion* : Especially, where a PRIVATE PERSON is *intituled to the Penalty* ; and none of it belongs to the Crown.

Lord MANSFIELD—As to the Court's NOT *quashing on Motion*, but putting the Party to *demur*--That Reasoning does not hold, where

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where the *Objection* is to the JURISDICTION of the Court that has undertaken to proceed.

Now here the Question is upon the *Jurisdiction*.

* This is agreed by Mr. *Williams* and Mr. *Norton*, to be a Proceed- * P. 389.
ing before the Lord Mayor PERSONALLY, though IN *Sessions*. But the 50th Section (which gives Him the Jurisdiction,) does *not* give it to Him PERSONALLY; but in *the Terms* of the common Commission of *Oyer and Terminer*: And the *same* Power is given to Him, as to the *other* Mayors, Bailiffs, Head-Officers of Boroughs, Stewards of Leets &c. Now this must be exercised *according to the Course* of the *Common Law*; i. e. by INDICTMENT.

But it is objected "That the *Sessions* cannot have Jurisdiction " *beyond the Limits of the City*:" Whereas this is given to the Mayor in any Place within 3 Miles of it.

The Answer to this is, "That this Jurisdiction of the *Sessions* is " *therefore*, by this Act, *extended* to 3 Miles beyond the City."

The Parallel does not hold, with regard to Informations *in rem*, in the Exchequer; (to which it has been compared.) For that Proceeding in the Exchequer depends upon the *Course* of the Court of Exchequer: And it is necessary there. For it is not there known, *Who* will claim; nor does it affect the *Party*: And the Person who owns the Goods may not perhaps be in Court, or may be unknown, or may not have other Opportunity to come in and claim. This is an ancient *Course* there; as ancient as the *Court* of Exchequer itself, and by *Common Law*.

But here is no Sort of Incongruity, in the present Case, in the Goods being forfeited by the *Party's* being convicted of the Offence, upon an *Indictment*. And here is no Colour for the Notion of a *summary Jurisdiction* in the Mayor, under the Authority of this Act of Parliament. Therefore the Information ought to be quashed, for want of *Jurisdiction* in the Mayor, to receive and proceed upon it.

Mr. Just. DENISON concurred. And he agreed with LORD MANSFIELD that there was *no Need* to put them to *demur*, in a Case where there is *Defect of Jurisdiction*: And cited a Case of *Rex v. Wesley*, on his own Motion, in Perjury; where the *Sessions* had no Jurisdiction; And therefore the Court quashed the Indictment.

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And as to the *Jurisdiction*—He concurred with Lord *Mansfield*; and (at large) gave the same Reasons, drawn from the 50th Section of this Act: which He said, manifestly considered the Mayor, merely as the *Head* of his Corporation; and did *not* intend to give
* P. 390. * Him a *summary Jurisdiction*, PERSONALLY. Consequently, they must proceed in the *ordinary Way*; that is, by *Indictment*.

And this very Act of Parliament *gives the Sessions the extended Jurisdiction* as far as within 3 Miles Compass of the City: For if it *gives the END*, it must be construed to give the *Means* too.

And it is *not like* the Proceedings *in rem*, in the Exchequer. For the Justices here may give the Forfeiture, undoubtedly, *upon an Indictment*, (after Conviction.)

This *Information* therefore ought to be *quashed*: as it appears that the Lord Mayor, PERSONALLY, had *no such Jurisdiction*.

Mr. Just. FOSTER concurred. He held that the 50th Section did *not* give the Jurisdiction to the Mayor PERSONALLY, and in a *summary Way*; but as the *HEAD of a Court*: And He said that the whole Clause (taken together) plainly shews this. Therefore the Proceeding ought to be in the ordinary Course, *viz.* by *Indictment*. And if they have *proceeded WITHOUT Jurisdiction*, they ought to be stopped; and the Information may be *quashed upon Motion*: For as there is *no Jurisdiction*, the REASON *does not hold* for putting the Defendant *to DEMUR*; but We may in *such Case*, very properly quash, *on Motion*. Consequently, this Information, being of this Kind, ought to be quashed.

Per Cur. unanimously—RULE for quashing the Information made absolute: And the former RULE (prayed for quashing the *Certiorari*) DISCHARGED.

Wednesday,
29th June
1757.

Bright, Executor of Hannah Crisp, Widow, *vers.*
Eynon.

(*Mr. Justice Wilmot was absent; Sitting in Chancery, as One of the Lords Commissioners of the Great Seal.*)

THE Plaintiff's Counsel moved for a NEW TRIAL, upon Payment of Costs; and obtained a Rule "to shew Cause why
"this *Verdict* should not be SET ASIDE, upon Payment of Costs."

Lord

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Lord MANSFIELD said that He did not choose, in any Cause tried before Him, to conclude the Matter by a short Report, “that He was satisfied, or dissatisfied, with the Verdict.” He would state the Case particularly to the Court; and reserve declaring his * Opinion of the Verdict, (which he had not yet intimated, either * P. 391. at the Trial or since,) till He had heard the Counsel on both Sides.

This was an Action upon the Case, brought by the Plaintiff, as Executor of *Hannab Crisp* Widow deceased, against the Defendant, upon a Promissory Note in the following Words (all of the Defendant's own Writing,) which was proved and read: “I acknowledge
“to have borrowed of Mrs. *Hannab Crisp*, this 29th Day of Sep-
“tember 1753, the Sum of 60*l.* For which I promise to pay 5*l.*
“*per Cent. per Annum*, and to be accountable for the whole, six
“Months after Notice given for that Purpose. *John Eynon. Sep-*
“tember 29th 1753.”

The Defendant set up a *Discharge* by a Writing in the following Words: “I promise unto *John Eynon*, that, *in Consideration* of
“his paying unto Me, Interest for Sixty Pounds He has of mine,
“during my Life, after the rate of 5*l. per Cent. per Annum*, that
“then the said Sixty Pounds, at my Decease, shall be *His*, and his
“Note for the same shall be *void* and of *none Effect*. Witness
“my Hand, this 10th of *October* 1753. *Hannab Crisp*.” The
Body was all *his* own Hand; but he called two Witnesses who said they believed the *Name* subscribed to be the Hand of the Testatrix: But their Knowledge of her Hand was very slight; One of them having only seen her sign a Receipt.

He alledged that She gave this Discharge, in Consideration of a Marriage between him and *Rebeccab Bright* his now Wife, (Sister to the Plaintiff.)

He produced a Will, in his own Custody, bearing Date the 11th of *August* 1753; by which the Testatrix had made the said *Rebeccab Bright* her Executrix and Residuary Legatee.

This Marriage was not till *May* 1754: The Testatrix died in *April* 1756.

It came out, upon his own Evidence, that the Testatrix was not worth 200*l.* and that She paid 5*s.* a week or at the Rate of 13*l.* a Year, for her Board. He could make no Proof of the Consideration alledged: The farthest that any of his Witnesses went, was to say “that the Testatrix seemed to approve the Match.”

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The Plaintiff, in Reply, insisted "that the Signature was *forged*." *Josias Eright* swore, that the Defendant's Wife did not know the Defendant had borrowed any Money from the Testatrix, till after She was married. After She was acquainted with it, She pressed him to pay the Money, out of a Legacy of 150 *l.* from one *Sarah* * P. 392. * *Hart*, which he received: For the Testatrix might call it in. The Defendant bid her not be uneasy: "for I must have six Months " Notice."

Several Witnesses proved, that *Hannah Crisp*, about *Michaelmas* 1754, talked of calling in the Money upon this Note, and lending it to other Persons.

That in 1755 and 1756, She ordered Letters to be wrote to the Defendant, for the Money. When She gave these Orders, She produced the Defendant's Note, and said "the Interest was not enough " to maintain her."

It was proved, that the Defendant entered a *Caveat* at *Doctors Commons* in *April* 1756: and when he found She had made a Will in Favour of the Plaintiff, and consequently revoked that which was in Favour of his Wife, He was very warm, and mentioned a Note from him to her; and declared he would not withdraw his *Caveat*, unless It was given up.

The Plaintiff examined no Witness, to say the Signature was not her Hand. By Way of Rejoinder, they called Witnesses to the Defendant's Character: who gave him a good one.

The Defendant instructed his Counsel to say, that he always understood the Gift to be revocable by *Hannah Crisp* during her Life; but if She did not revoke or call in the Money during her Life, then the Debt was to be discharged.

The principal Question made at the Trial was, "Whether this " latter Note was forged, or not." And as to that, the two Witnesses who believed it to be her Hand, were not opposed by any Witnesses to the contrary: The Reason given, was, that the Plaintiff had no Opportunity of getting it inspected.

His Lordship said, He left two Questions to the Jury: (1st.) "Whether the Name of the Testatrix was *forged*;" (2d.) If they took it, upon the Evidence laid before them, to be her Hand, then "Whether it was not obtained by *Fraud*, and without her *knowing* " the Contents and Effect of the Writing She signed."

The -

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The Jury found for the Defendant.

Lord *Mansfield* intimated nothing, then, as to his *own* Opinion of the Case; and professedly avoided doing it now, till He should have heard the Counsel.

* They were accordingly heard. And They who shewed Cause * P. 393.
against the Rule, went very much at large into the *Propriety* and *Rise* of granting *New Trials*. They urged, that a Verdict ought to be *conclusive*, where Evidence of any Sort was given on *both* Sides. That the *Forgery* here was the *only* Question: if the Plaintiff objected *Fraud* and *Imposition*, He must go to a Court of *Equity* for Relief.

LORD MANSFIELD—Trials by Jury, in Civil Causes, could not subsist now, without a Power, *somewhere*, to grant new Trials.

If an erroneous Judgment be given in Point of *Law*, there are *many* Ways to review and set it right.

Where a Court judges of Fact upon *Depositions in Writing*, their Sentence or Decree may, *many* Ways, be reviewed and set right.

But a general Verdict can *only* be set right by a *new Trial*: which is no more than having the Cause more deliberately considered by *another Jury*; when there is a reasonable Doubt, or perhaps a Certainty, that *Justice has not been done*.

The Writ of *Attaint* is now a mere Sound, in *every* Case: In *many*, it does not pretend to be a Remedy.

There are numberless *Causes* of false Verdicts, *without* Corruption or bad Intention of the Jurors. They may have heard too much of the Matter, before the Trial; and imbibed Prejudices, without knowing it. The Cause may be intricate: The Examination may be so long as to distract and confound their Attention.

Most general Verdicts include *legal Consequences*, as well as Propositions of Fact: In drawing these Consequences, the Jury may mistake, and infer directly contrary to Law.

The Parties may be *surprized*, by a Case falsely made at the Trial, which they had no Reason to expect, and therefore could not come prepared to answer.

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If *unjust* Verdicts, obtained under these and a thousand like Circumstances, were to be conclusive for ever, the Determination of Civil Property in this Method of Trial, would be very precarious and unsatisfactory. It is absolutely *necessary to Justice*, that there should, upon many Occasions, be Opportunities of *reconsidering* the Cause by a new Trial. And it is done in a Way very favourable to the Parties for whom the wrong Verdict is given: It is, *upon*

* P. 394. * Payment of *Costs*. Whereas in *other* Cases where a wrong Judgment is reversed, Costs are paid as if the right Judgment had been given in the first Instance.

It is NOT *true* "that no new Trials were granted *before 1655*;" as has been said from *Style 466*.

In *Slade's Case*, M. 24 C. 1. (which was in 1648,) in B. R. reported in *Style 138*, The Court was moved for Judgment, formerly stayed upon a Certificate, made by Baron *Atkyns*, "That the Verdict passed against his Opinion." *Bacon* Justice said, "Judgments HAVE BEEN arrested in the *Common Pleas*, upon such *Certificates*." *Hales*, of Counsel with the Defendant, prayed that the Judgment in that Case of *Slade* might be arrested, and that there might be a *New Trial*; "For that it HAD BEEN DONE THERETOFORE, in like Cases." Indeed that Case, as there reported, represents *Rolle* Justice to hold "that it ought not to be stayed, *though it have been done* in the *Common Pleas*: for that it was too arbitrary for them to do it." And He adds "You may have your Attaint against the Jury; And there is no other Remedy in Law for You: But it were good to advise the Party to suffer a new Trial, for better Satisfaction."

In the Case of *Wood v. Gunston*, *Michaelmas 1655*, *Banc. Sup. Style 466*. (which was an Action upon the Case, for speaking scandalous Words of the Plaintiff, and a Verdict for the Plaintiff, with 1500 *l.* Damages,) the Defendant moved for a new Trial. And *Glyn* Chief Justice said "It was in the *Discretion of the Court*, in *some* Cases, to grant a new Trial: But this must be a *judicial* and *not an Arbitrary* Discretion. And it is FREQUENT IN OUR BOOKS, for the Court to take Notice of the Miscarriages of Juries and to grant *new Trials* upon them. And it is for the *People's Benefit*, that it should be so: For a *Jury* may sometimes, by indirect Dealings, be moved to side with one Party, and not to be indifferent betwixt them; but it can not be so intended of the Court." And in that Case, a *new Trial* was ordered, upon the Defendant's paying full Costs; the Judgment standing as a Security to pay what might be recovered upon the next Verdict.

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The Reason why this Matter cannot be traced *further back*, is,
“ that the Old Report-Books do not give any Accounts of Deter-
“ minations made by the Court upon *Motions*.”

Indeed, for a good while after this Time, the Granting of new Trials was holden to a degree of *Strictness*, so intolerable, that it drove the Parties into a *Court of Equity*, to have, in effect, a new Trial at Law, of a *mere legal* Question; because the Verdict, in * Justice, under all the Circumstances, *ought not to conclude*: And * P. 395.
many Bills have been retained upon this Ground; and the Question tried over again at Law, under the Direction of a Court of Equity. And therefore of *late* Years, the Courts of Law have gone more *liberally* into the granting of New Trials, according to the Circumstances of the respective Cases. And the Rule laid down by Lord Parker, in the Case of the *Queen* against the *Corporation of Helston*, H. 12 Ann. B. R.* seems to be the *best General Rule* that can be * See Lucas's Reports pa. 202.
laid down upon this Subject; viz. “ Doing *justice* to the Party,” or in other Words “ Attaining the *justice* of the Case.”

The REASONS for granting a New Trial must be collected from the *whole* Evidence, and from the *Nature* of the Case considered under *all it's Circumstances*.

This Power may be exercised at much less Expence of Time and Money, therefore *more beneficially for the Subject*, by the Court of *Common Law* where the Cause has been tried.

Of late Years, New Trials have been granted not only after Trials at *Nisi prius*, but also after Trials at Bar. And it is at least *equally reasonable* to do it after Trials at Bar, as after Trials at *Nisi prius*, (if the Justice of the Case demands it;) or, indeed, rather *more* so, as the latter must be done upon what could have actually and personally appeared to a *single* Judge only, whereas the former is grounded upon what must have manifestly and fully appeared to the *whole* Court.

I come now to the present Verdict; and should be sorry that the Question depended upon *my* being satisfied, or dissatisfied: and therefore I have stated the whole.

If the Matter in Dispute was of *great Value*, I will not say that all the suspicious Circumstances *might not* be a Ground for a new Trial; to give the Plaintiff an Opportunity of getting the Instrument *inspected* by Persons acquainted with her *Hand*: though I think upon the Evidence *laid before the Jury*, the Verdict, in *that* respect, was *right*.

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What I go upon is the apparent manifest FRAUD and IMPOSITION in *obtaining* the Discharge from the Testatrix, if She *really* signed it.

FRAUD or COVIN may, in Judgment of the Law, *avoid* every kind of Act: Many Instances are put in *Fermor's Case*. 3 Co. 77.

* P. 396. * "*What Circumstances and Facts amount to such Fraud or Covin,*" is always a Question of *Law*. Courts of Equity, and Courts of Law, have a *concurrent* Jurisdiction, to suppress and relieve against FRAUD. But the Interposition of the former is often necessary for the *better investigating* Truth, and to give *more complete* Redress.

The Writing, upon the *Face* of it, speaks IMPOSITION. It purports being for *Consideration*. She Releases the Principal, in *Consideration of 5 l. per Cent.* during her Life: Which is only legal Interest, and the precise Rate he was obliged to pay by his Note. The Defendant has set up *another* Consideration, *not* expressed: which is not only *not proved* by him, but *disproved* by the Evidence on both Sides.

He now contends, and his Counsel have argued, "that it was intended to be revocable by Her during her Life; and therefore "was only in the Nature of a Legacy." That Power "to revoke" is *omitted*; The Writing, all of his *own hand*, and kept in his *own Custody*: And if it was in the Nature of a Legacy, It is *revoked* by the subsequent Will.

The Testatrix *never imagined* She had stripped herself of this Money: In her *Circumstances*, It would have been Madness. The Defendant, *during her Life*, did not dare to say, even to his own Wife, "that the Testatrix *had given* him this Money."

He did not dare to claim it, *immediately*, after her Death: but would have *compounded*, by withdrawing his Caveat, to have got his Note delivered up. *No Answer* was attempted, by Proof, to the *apparent Imposition*. Upon his own Case stated by himself, and the Evidence on both Sides, the Transaction to get her hand to this Writing must have been *fraudulent*: And if it be so, the Law says "He shall *not avail* himself of it."

The *Attention* of the Jury was artfully drawn to the heinous Charge of Forgery, *only*. And I left the Question of FRAUD to them, without any *express* Direction "that the Circumstances spoke "Fraud apparent." The *same* Jury might, upon Reconsideration, find a *different* Verdict. I dare say, they *meant* to do right.

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But the Merits of the Case appearing to Me in this Light, I am clearly of Opinion that there *ought* to be a NEW TRIAL.

These are my Sentiments: My Brothers will judge Whether I am right, or not.

* Mr. Justice DENISON concurred in them.

* P. 397.

He added, That it would be difficult perhaps to fix an *absolutely General Rule* about granting new Trials; without making so many Exceptions to it, as might rather tend to darken the Matter, than to explain it: But the granting a new Trial, or refusing it, must depend upon the LEGAL DISCRETION of the Court; guided by the *Nature and Circumstances* of the particular Case, and directed with a View to the *Attainment of Justice*.

In the present Case, He said, It appeared to Him, “ That the Testatrix, Mrs. *Crisp* had been *imposed upon* :” And He held “ That FRAUD was sufficient to *invalidate* this her Defeazance (the subsequent Note of Discharge signed by Her,) even in a Court of COMMON Law.” For Proof of which, He cited *Thoroughgood’s* Case, 2 Co. 9. Where it was holden “ That the Deed of an unlettered Layman, into the Execution whereof he is *deceived*, by it’s being wrong read to him, or falsely explained to him, (though by a Stranger to the Party to whom the Deed is made,) shall *not bind* the unlettered Person who made it.”

Mr. Just. FOSTER agreed to the Propriety of what had been said; as to such Cases in which the Juries give Verdicts *against* Evidence; and even as to Cases where there may be a Contrariety of Evidence, but the Evidence, upon the Whole, in Point of Probability, greatly *preponderates against* the Verdict; (Which, depending on a Variety of Circumstances, is Matter of Legal Discretion, and cannot be brought under any General Rule :) But in all Cases where the Evidence is *nearly in Æquilibrio*, He declared that He should always think himself bound to have Regard to the *Finding of the Jury*; For “ ad quæstionem * *Facti* respondent *Juratores*.” In such a Case, it is *not* the Province of the Judge, to determine: It ought to be left to the Jury.

* See Trials per pais, pa. 447. (the last Paragraph of the Book,)

FRAUD will *invalidate*, in a Court of Law, as well as in a Court of Equity. We All remember the Case of *Wyndham v. Chetwynd*, P. 1755. 28 G. 2. in this Court: Where the Court directed the Jury to find “ *Non devisavit*,” though there was a *Devise in Fact*; but it was *obtained by Fraud*, and therefore considered as *no Devise* at all.

extremely strong, on this Subject, in favour of Juries.

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And He agreed with Lord *Mansfield* and Mr. Justice *Denison*, That in the present Case, the Defeazance or Discharge (the subsequent Note) was obtained from Mrs. *Crisp* by *Fraud*; And that it appeared, upon the whole of the Evidence "that it was *so obtained*:" And that the Jury have drawn a WRONG CONCLUSION from Facts admitted on both Sides.

* P. 398. * Therefore He thought The Verdict ought to be *set aside*.

Per Cur. * unanimously,
The RULE for *setting aside* the Verdict was made *absolute*.

* Note. Mr. Justice *Wilmot* was absent (in Chancery.)

Mr. *Gould*, of Counsel for the Plaintiff, moved that it might be *without Costs*: But He was answered by Mr. Justice *Denison* and Mr. Justice *Foster* (Lord *Mansfield* being now gone,) That this was directly contrary to the Terms upon which He himself had moved it. And accordingly They only Ordered the Verdict to be set aside

Upon Payment of Costs by the Plaintiff.

Memorandum—The Cause never came on, to be tried again. Probably, the Defendant acquiesced in the Opinion of the Court, and paid the Money.

A Black Merchant of Bombay *vers.* Dorrell.

MR. *Dorrel*, who came from *Bombay*, and had a Dispute with a Black Merchant there, of a Civil Nature (concerning Property,) had upon his Leaving *Bombay*, entered into a Bond conditioned for his *Appearance in this Court* at his Arrival in *England*, TO ANSWER to any demand, that might be made against him by or on Behalf of the said *Black Merchant* in that Country; and also to abide by the Determination of the Mayor's Court there, or else to appeal therefrom to the King in Council.

Serj. *Hewitt* moved, on Behalf of Mr. *Dorrell*, that He might appear in this Court, in such METHOD as the Court should judge proper, in Order to prevent the Forfeiture of his Bond.

The COURT, after requiring Notice to be given to the *East-India Company* (who did not oppose it,) admitted his Appearance; and directed that He should enter into a Recognizance (with Sureties) in
the

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the Penalty of the Bond, to answer the Demands expressed in the Condition of the said Bond: Which He was to do before One of the Judges of this Court; as his Sureties were not now present.

Note—This Rule was taken on the *Civil* Side (of the Court.)

* *Rex vers.* Middlehurst.

* P. 399.

MR. *Norton* shewed Cause against quashing an Order of two Justices, and an Order of Sessions confirming it, made in Pursuance of the Act of 11 G. c. 19. § 3. (for the more effectual securing the Payment of Rents, and preventing Frands by Tenants,) against one *Thomas Middlehurst*, for wilfully and knowingly aiding and assisting in fraudulently removing and conveying away 5 Cows, &c, OR in concealing the same.

Mr. *Gould*, who had moved to quash this Order, founded his Motion upon two Objections; *viz.*

1st Objection. The whole Adjudication refers to the Complaint of One *Thomas Weston*; Wherein there is *no Charge upon Chesterton*, the *Tenant*, at all; nor upon the Defendant *Middlehurst*, for aiding and assisting *Him*: Neither is it stated “That *Chesterton*, the *Tenant* DID remove the Goods.”

2d Objection. The Act creates two Offences, *viz.* assisting in removing, and assisting in concealing the Goods. Now it is not specifically charged upon the Defendant *Middlehurst*, that he wilfully and knowingly did *either* One of these two things: It is only alleged that he wilfully and knowingly did One OR the Other. In 1 *Salk.* 371. *Rex v. Stocker*, An Indictment for forging *or* causing to be forged, was holden ill; because the Charge was in the *disjunctive*. 2 *Hawk. P. C.* 225. § 60. An Indictment charging a Man *disjunctively*, is void: For the Offences are distinct; And it appears not, of *wh. ch* of them the Defendant is accused. So here, it does not appear, WHICH of the *two* Offences the Justices have convicted him of.

And 2 *Ld. Raym* 1265. *Queen v. Bains*, proves that the Court will make no Intendment against the Defendant.

Upon which Objections, he obtained a RULE to SHEW CAUSE “why the Order should not be quashed.”

And now Mr. *Norton* shewed the following Cause against quashing it.

As

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* P. 400. * As to the 1st Objection—"That it is not described sufficiently,
1st. "What the Offence is." He answered That this is an Order :
And the Court will *not intend* it to be ill. To prove which, He
cited *Rex v. Biffex*, Tr. 29 G. 2. B. R.

2dly. As to the 2d—The Charge being in the *Disjunctive*, "That
"he wilfully and knowingly aided and assisted the Tenant in re-
"moving the Goods, OR in concealing the same." He said, The
Crime and the Punishment are the *same* upon *both*: And the De-
fendant *was heard*.

Mr. Gould for the Defendant, replied—

1st, It is not at all stated "That the *Tenant* DID *remove* the
"Goods."

2dly, The Aiding and Assisting *in removing*, is a *different* Of-
fence from aiding and assisting *in concealing*: And here it is only
charged in the ALTERNATIVE.

LORD MANSFIELD—Upon INDICTMENTS, it has been so deter-
mined, "That an *Alternative* Charge is *not* good;" As "forged
"or caused to be forged:" Though *One only* need be *proved*, if
laid *conjunctively*, (as "forged *and* caused to be forged.") But I
don't see the Reason of it: The Substance is exactly the same; the
Defendant must come prepared against both; And it makes no Dif-
ference to him, in any respect.

But this is an ORDER: And being *good in Substance*, needs not
be literally *so strict*.

Mr. Just. DENISON thought also, that the Cases upon *Indictments*
are very nice. But this is *not* an Indictment, but an ORDER: And
therefore being good in *Substance*, needs not be so strict in *Form*, as
an Indictment must be. And either Aiding or Assisting *in removing*,
OR aiding or assisting *in concealing*, is equally an Offence: And these
are the very Words of the Act. 'Tis *only Form*; and does not at
all vary the Defence or Punishment. I am not therefore inclined
to the same Strictness as was observed in the Case of *The King v.*
Stocker, in 1 Salk. 371.

* Mr. Just.
Foster was out
of Court; and
Ld. Commis-
sioner *Wilmot*
in Chancery.

Per * *Cur.* RULE DISCHARGED:

And consequently BOTH ORDERS AFFIRMED.

The End of Trinity Term 1757, 30 & 31 Geo. 2.

* Michaelmas Term * P. 401.

31 Geo. 2. B. R. 1757.

Masters *vers.* Manby

Monday, 7th
November
1757.

MR. Norton moved that the Defendant might be discharged upon Common-Bail, as being a *menial Servant to a Public Minister*, (*viz.* Messenger to Baron Haflang,) on 7 Ann. c. 12.

But the Defendant was not able to make out a Case sufficient to induce the Court even to grant Him a Rule to shew Cause. He not only had been formerly a Trader, and a Bankrupt; (upon which indeed no Stress was laid, as it appeared that he had not traded at all, since he had obtained his Certificate under the Commission;) But was confessedly a *Land-Waiter* at the Custom-House here in London, and *officiated there* as such: though He swore to the Hiring, and also to the having *sometimes* executed this Service to the Baron, as *his Messenger*.

Yet, upon the whole, Lord MANSFIELD was clear that this Man could never be esteemed a * *bonâ fide* Domestic of a foreign Minister: And the other Judges concurring, the Motion was DENIED.

* V. ante,
pa. 1478. and
pa. S. P.

Bennett, qui tam, &c, *vers.* Smith.

Monday, 14th
November
1757.

THE COURT refused to set aside a *Non Prof.* regularly obtained by the Defendant, against the Plaintiff who was only a *COMMON Informer*, (who sued for a Penalty of 10000 l. upon the Statute of Usury;) though the Plaintiff offered to pay the Costs of setting it aside.

For, though LORD MANSFIELD seemed to think that the Case might perhaps have born a different Consideration, in case the

Michaelmas Term 31 Geo. 2.

* P. 402. * Plaintiff had been the *Party* REALLY INJURED, and had sued in Order to come at *Justice and Reparation* for such real Injury; Yet not only his Lordship Himself, but

* Mr. Just.
Foster was not
in Court.

The whole COURT (now * present) were clear and unanimous that where a MERE *Common Informer*, who sued for PUNISHMENT only, had been guilty of a Slip or Mistake which put him out of Court and intitled the Defendant to enter a *Non Prof.* against him, they would not exercise their *discretionary Power*, in setting aside this *Non Prof.* thus regularly obtained, and restoring the mere *Common Informer* to an Opportunity of proceeding for the Sake of *Punishment* only.

And they distinguished the present Case from Cases of AMENDMENT: Which indeed the Court would not scruple to make, even in Cases of *Qui tam* Actions, where there was any thing to amend by; and which they had frequently done, in some Instances that were mentioned or at least hinted at; as, in particular, the giving Leave to *change the County*, in a *Qui tam* Action, on Mr. Norton's Motion, not many Terms ago.

Tuesday, 15th
November
1757.

Rex *vers.* Robert Chappel.

A Motion was made by Mr. *Burland*, and supported by Mr. *Norton*, for an Information for *sending a Challenge*, by Letter, to Mr. *Hamilton* of *Wells*: But they only produced *Copies*, NOT the ORIGINALS of the Letters wherein the Challenge was contained.

THE COURT made a Rule to shew Cause, upon reading the COPIES only of the Letters; (such Copies being sufficiently verified.)

Wednesday,
16th November
1757.

Rex *vers.* Williams.

THIS was a Cause in the Crown-paper, upon a Writ of Error directed to the Justices of the Great Session in the County of *Denbigh*, upon a Judgment given there for the King against the Defendant after a Verdict, upon an Information brought against Him in that Court by the Protonotary and Clerk of the Crown there, at the Relation of *John Mostyn*, Esq; according to the Form of the STATUTE in that Case made and provided.

The Information sets forth the Incorporation of the Town of *Denbigh*, by Letters Patent dated 14th May 15 C. 2. Which gave them Power to have and hold within the Burrough a Court of Record on every Friday in every second Week throughout the Year,

Michaelmas Term 31 Geo. 2.

* to be held *before the Bailiffs* of the said Burrough for the Time * P. 403.
being, or One of them.

Then it alledges the Acceptance of these Letters Patent by the Corporation.

It further shews, that by virtue of these Letters Patent, the said Court of Record, from the Time of making the said Letters Patent, to the Time of exhibiting the Information, ought to have been held within the said Burrough on every *Friday* in every second Week through the Year, *before the Bailiffs* of the said Burrough for the Time being, or One of them.

Then it charges that *Friday* the 13th Day of *December* 25 G. 2. was a Day on which the said Court of Record ought to have been so held within the said Burrough, by virtue of the said Letters Patent. That the Defendant (well knowing the Premises aforesaid) on the said 13th Day of *December* 25 G. 2. at the Burrough of *Denbigh* aforesaid in the County of *Denbigh* aforesaid, in the Absence of *John Hosier* Gentleman and *David Williams* Gentleman, who then and long before and afterwards were *the Bailiffs* of the said Burrough, and of each of them, did wrongfully and unjustly PRESUME TO HOLD and DID hold THAT Court of Record within the said Burrough, WITHOUT any legal Warrant Right or Authority whatsoever; and did then and there *preside* therein; He the said *Thomas Williams* (the Defendant) then NOT being one of the *Bailiffs* of the said Burrough.

PLEA—That He *did* NOT hold the said Court of Record in the said Information supposed to have been held by the said *Thomas* (the Defendant) *nor did preside therein*, in Manner and Form as by the Information is charged against him. (Upon which, Issue is joined.)

And the Defendant farther saith, that at the Time mentioned in the Information, HE HAD NOT, NOR HATH any Warrant Right Power or Authority; but *wholly* DISCLAIMS to have any Warrant Right Power or Authority whatsoever to hold the said Court of Record, or to *preside* therein: And this He is ready to verify. Wherefore he prays Judgment, and that He of the Premises aforesaid may be discharged and dismissed by the Court, and so forth.

Upon the Issue joined, the Jurors find that the Defendant, on 13th *December* 25 G. 2. at the said Burrough of *Denbigh*, in the Absence of *John Hosier* Gentleman, and *David Williams* Gent. who then and long before and afterwards were the *Bailiffs* of the said Burrough, and of each of them, *did* wrongfully and unjustly presume to hold, and *did hold* the said Court of Record in the said Information.

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* P. 404. * formation mentioned, within the said Burrough, *without* any legal Warrant or Right or Authority whatsoever; and *did* then and there *preside* therein; (He the said *Thomas Williams* then not being One of the Bailiffs of the said Burrough;) as in the said Infomation is alledged.

The Judgment of the Court is “that the Defendant do *not* in
“ *any Manner intermeddle with or concern Himself* in and about hold-
“ ing of the said Court of Record within the said Burrough, in the
“ said Information specified; but that He be absolutely *forejudged*
“ *and excluded from holding* the said Court for the future; And that,
“ in order to satisfy our Sovereign Lord the King, for and on Ac-
“ count of the Usurpation aforesaid, He be *taken*, and so forth;
“ AND that the said *John Mostyn*, the Relator above-mentioned in
“ this Behalf, *do recover* against the said *Thomas Williams* the Sum
“ of 141 l. 12 s. 11 d. *for his Costs* by him laid out and expended
“ in carrying on his Suit in this Behalf, ACCORDING to the Form of
“ STATUTE in such Case made and provided.”

The Assignment of Errors is—

1st. General—*viz.* That Judgment is given for the King against the Defendant: Whereas by the Law of this Kingdom, it ought to have been given for the Defendant.

2dly. Special—*viz.* And also in this, that it appears by the said Record, that Judgment in the Plea aforesaid was given “that the said
“ *John Mostyn*, in the said Plea named *the Relator therein*, *recover*
“ *against the said Thomas Williams* 141 l. 12 s. 11 d. *for his Costs*
“ laid out in that Suit:” Whereas by the Law of this Realm, No
Judgment ought to have been given, in the Plea aforesaid, for THOSE
or for any other Costs in that Suit. And therefore in that respect
also, there is manifest Error.

To this Assignment of Errors there is a Joinder in Error, in the Name of the King's Coroner and Attorney in this Court.

Mr. Madocks, for the Plaintiff in Error—

Objected, that this was NOT a Case within 9 Ann. c. 20: And that therefore there could not, nor ought to be any Judgment for Costs:

That Act takes in only two Cases; 1st. Where an Office is *usurped*: and 2dly Where He *has had* a Title, but unlawfully *holds* and *exercises* the Office: But the whole is *confined to OFFICES in Corporations*; and the Words “said Offices and Franchises” are tied

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* up to OFFICES in Corporations, or to the Franchise of being a * P. 405.
Freeman. [See Sections 4 & 5.]

Whereas this Information is only for *holding a Court* in the Burrough, in the Absence of the two Bailiffs; He not being one of the Bailiffs of the Burrough. So that this is *no direct Charge* of usurping the OFFICE of Bailiff. And an *indirect Charge* is not sufficient: 2 *Harek. P. C.* 261. "Whatsoever Certainty is requisite in an Indictment, the same, at least, is necessary also in an Information." 1 *Salk.* 375. *Rex v. Knight*; and 1 *Ld. Raym.* 527. *Rex v. Knight and Burton*, S. C; prove expressly "That *argumentative Informations* are naught."

This is only a Charge of doing a *single Act*; which Act belonged indeed to the Office of Bailiff: But it is no Charge of his *claiming the Office of Bailiff*; Nor could the Right to the OFFICE of Bailiff be tried upon THIS Information. And this, He said, was a new Case: For the Common Way is to charge the Defendant *directly* with usurping an Office; whereas this only charges him with Facts that may indeed be *Evidence* of such Usurpation of the Office of Bailiff; but does not charge Him with a direct Usurpation.

Secondly. It cannot properly be called an Information *in Nature of a Quo Warranto* at Common Law: For it does not charge Him with exercising the Office at the TIME of exhibiting the Information.

"*Non usurpavit*," generally and alone, is not a sufficient Plea to an Information in Nature of *Q. W.* at Common Law. *Godbolt* 91. *Sir Jervis Clifton's Case*; and 3 *Leon.* 184. *Sir Gervase Clifton's Case*, S. C. *

[* This Case was not determined: V. *Godbolt* 93.]

This Information only charges Him with holding the Court upon a particular Day. On the whole, therefore, this Information is not good at *Common Law*, neither; no more than it is upon the Act of Parliament.

Mr. Hall *contra*, pro Rege.

This STATUTE-Judgment, "for the *Costs*," is good: And so also is the *Common-Law* Judgment, "of *Ouster* of the Franchise."

1st. The Act of 9 *Ann. c.* 20. ought to be *liberally* construed.

This Information is an Information for usurping the Office of one of the Bailiffs of the Burrough of *Denbigh*. The Facts charged upon the Defendant amount to an Usurpation of the Office: though the Word "*usurp*" is not indeed made Use of. And it is not necessary to

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* P. 406. * use this or any other *technical* Term. Therefore this Usurpation of the *Office of Bailiff*, is here sufficiently alledged.

But, at least, it is a Charge of an Usurpation of or intruding into a *Burrough-Franchise*: Which is a Case within the Act. The Preamble and Body of the Act prove this.

This is for holding and presiding at a Court *in* a Corporation: Which certainly is a *Corporation-Franchise*. And the Defendant, by his Manner of Pleading, has considered this as an Information on the Act, for a Burrough-Franchise: For He first pleads to the particular Charge, and then disclaims.

But, at least, this Case shall be taken to be within the *Equity* of the Statute: Which was made for the Benefit of the Commonwealth. Which Point He endeavoured to prove, from several Instances of *extensive Constructions* of Statutes; And particularly of Statutes giving Costs. For the latter, He cited, *Cro. Eliz.* 257. pl. 36. * *Haselip v. Chaplen*. And He said, that the Court often Ordered Costs, even where the Statutes had not given them.

[* Adjournatur.]

As to the Case of *Rex v. Knight*, The Facts there charged were not sufficient to support the Conclusion: It was an imperfect defective Information. But here, it is positively alledged "That he held this Court without any legal Warrant Right or Authority whatsoever."

And this may be made good by Intendment. *Raym.* 34, 35. *The King v. Read.* *Siderf.* 91. *Rex v. Cover.* *Cro. Jac.* 473.

Secondly—As to the not charging the Defendant with exercising the Office *at the Time* of the Information; *One single Act* is sufficient.

Upon the Whole, this Case is either within the *Words*, or at least within the *Intent* of the Act.

Mr. *Madocks* in Reply—There is no *express*, but only a *circumstantial* Charge, of exercising the *Office* of Bailiff.

The *Equity* of every Statute stands upon the Foundation of the Statute itself. Now this Act is certainly confined to *Offices* in Corporations, affecting the Rights of Election of Members to Parliament: And was not intended to take in Rights of holding *Courts* or *Fairs* in Corporations; though the Words of the *Title* are indeed general, "the Rights of Offices and Franchises in Corporations and Burroughs." But the *Body* of the Act confines the Word
" Fran-

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* “Franchises” to the Rights of being free: And the Body of the * P. 407.
Act is the Part to be regarded.

And here is no Charge of intruding into the *whole* Office: Which is an *entire* Thing. The Usurpation of *Part* cannot be an Usurpation of the *Whole* of an Office.

Secondly—The Information ought to be good in it's self and upon it's own Strength, independent of the Plea. This is an Information only for doing this *single* Act, *six Years ago*.

LORD MANSFIELD—

1st. The Act is meant to extend to *all Officers of Corporation*, as such; and as far as relates to all the Corporate Rights of the Burgesses and Freemen, it is very legally, clearly, and correctly drawn: But it is not within the Reason or Meaning of the Act, that it should extend generally to ALL Offices or Franchises exercised WITHOUT *Authority from the Crown*, within a Corporation. It was meant to be *confined* to such Franchises as were claimed in Instances affecting those Rights between Party and Party.

The *Title* cannot control the *Body* of the Act.

And the *Equity* of an Act can be carried no further than to what was within the *View and Intention* of the Legislature, and the *Mischief* meant to be prevented. Whereas here is *no such* Equity, to bring the present Case within the Act.

Here is no Charge of usurping or exercising or claiming the *Office of Bailiff*. I do not say that any particular *technical* Words are necessary. But here are none that are at all tantamount: It is not even said that he held the Court, “*as Bailiff*.” There is no Argument neither, or Inference, “that He did so:” Rather indeed, the contrary; for it seems implied in the very Charge, that if they had been there, he could *not* have held it.

No Fruit is obtained of this Trial, but as of an Usurpation *upon the Crown* and for an *Offence* or Misdemeanour: Here is nothing relating to the Interest of any *PRIVATE Persons*. And the Manner of Pleading proves nothing: For he was obliged to plead so, in *either* Case.

Therefore, as a *Statute-Judgment* it is wrong.

2dly. But as to the *COMMON-Law* Part of the Judgment—Mr. *Madocks's* Objection will not hold. For He may certainly be punished

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* P. 408* ed for *One single* Offence ; though he goes no further. So that *this Part* of the Judgment is right.

Mr. JUST. DENISON concurred, That the *Statute*-part of the Judgment, as to the *Costs*, is wrong : But the *Common-Law* Part, *viz.* the Judgment of “*Exclusion* from the future Exercise of the “*Franchise*,” is right.

As to the former—The Charge is not within the Act of Parliament of 9 *Ann. c.* 20.

The Information sets out the Charter ; which gives Power to the Bailiffs to hold this Court in the Corporation : And it calls upon the Defendant to know by what Authority he held it in the Absence of the Bailiffs. But surely, this has no Relation in the Earth to the *Office* of BAILIFF ; nor will it be said that he could, upon *this* Information, have been OUSTED of the *Office* of BAILIFF. It was not, in the present Information, necessary to set out as Part of the Charge upon the Defendant “That the Court ought properly and regularly “to have been holden *before the Bailiffs* :” It had been enough, to have asked the Defendant “By what Authority *He claimed* to hold “*this Court of Record* ;” (without mentioning the Presence or Absence of the Bailiffs, at all.)

There are Numbers of Offices which a Man may usurp, and be liable to an Information for usurping ; which are NOT *Franchises* in Corporations. But *These* “*Franchises*” mentioned in the Act, mean *corporate* Rights or *Rights to Freedom* in Corporations. The Words of the Act are plain, that this is *not* a Case upon which the Informer can recover *Costs*.

The Proceeding indeed may be, at *Common-Law*, for *Punishment*. Therefore this *latter* Part is right. But the Judgment *as to* COSTS ought to be reversed.

And the *Mention* of a RELATOR is no more than *Surplusage*, and may be rejected ; and therefore *will not hurt* the *Common-Law* Judgment.

Mr. JUST. FOSTER was clear too—

1. That this Case was not within the Act : Which never intended to give *Costs* in Cases of *this Kind*. The Word “*Franchises*” in the Act, means only *Freedom*s and *Rights* to be Members of the Corporation.

Michaelmas Term 31 Geo. 2.

* This Act was drawn with great Care and Attention : (Judge * P. 409. *Powell* was the Person who drew it.) And there is no Reason to extend this Act beyond it's Intention.

2dly. The Judgment at *Common Law* may be very right.

Mr. Just. WILMOT declared himself extremely clear in both Points.

Per Cur. unanimously—

The *Common-Law* Judgment, *viz.* as to the OUSTER, was affirmed: But the Judgment for COSTS (which was founded upon the *Statute*,) WAS REVERSED.

Bond *vers.* Isaac.

Monday, 21
November

1757.

THE *Exoneretur* which had been ordered to be entered (*V. ante* 339, 340.) was not *actually* entered on the Bail-piece, (by the Omission of the proper Officer who ought to have entered it :) But the PLAINTIFF Himself was *apprised of the Surrender*; though his Attorney swore that *He* (the Attorney) had no Notice of it.

The Plaintiff's Attorney, not being apprised of the Surrender of the Principal sued out *Scire facias* against the Bail; who paid the Money: But they were sued out into *London* (where the Original Cause of Action was;) and *not into MIDDLESEX*, where the Surrender was made, and where the Bail-piece remained.

The Bail had applied, upon both these Irregularities, (*viz.* 1st. the PLAINTIFF's *being apprised* of the Surrender and Order of the Court; and 2dly the *Scire facias* not being sued out into *Middlesex*;) that the *Scire facias* might be set aside for Irregularity, with Costs; and the Money restored.

Mr. Norton was Counsel for the Bail, and had moved as above.

Sr. Richard Lloyd, for the Plaintiff, now shewed Cause.

The COURT was clear, on *both* Points, that the *Scire facias* were *irregularly* sued out; and granted Mr. Norton's Motion, by making the Rule absolute, as prayed: Excepting only, that they omitted the *Costs*; because it would have been to no Purpose to have ordered them, as the Plaintiff himself (who was apprised of the Surrender) was gone abroad; and the Attorney, (not being apprised of it) had not acted with any ill Design or Intention to oppress.

Michaelmas Term 31 Geo. 2.

* P. 410.

Tuesday,
22d Novem-
ber 1757.

* Sheepshanks et Uxor *vers.* Lucas.

P. 29 G. 2. Rot'lo 622.

ERROR from C. B. to *reverse a Common Recovery*. The Wife of *Sheepshanks* claiming to be intitled (in Common with others) to a Remainder in Fee (under the Will of one *Broadbent*) after the Death of one *Thomas Peirson*, Tenant in Tail, who was vouched in this Recovery; her Husband and She bring this Writ of Error: And the Error assigned is “The *Death of the Vouchee*, before “Judgment;” concluding with an *Averment*.

“*In nullo est erratum*”—is pleaded: (Which *confesses* the Error assigned, to be *true in Fact*.)

Serjeant *Poole* for the Plaintiff in Error—

Without Doubt, a Person intitled to a Remainder after an Estate-Tail, *may have a Writ of Error* to reverse a Common Recovery suffered by the Tenant in Tail. 3 Co. 3 b. The Marquis of *Winchester's* Case, is expresse to this Purpose; and gives the Reason of it, at large. *Pigott, Of Common Recoveries* 169. “If the Vouchee die “before Judgment, it is Error.” 1 Ro. Abr. 742. Title *Error*; Letter A. pl. 3. 1 Ro. Abr. 747. Title *Error*, Letter K. pl. 1. 1 Ro. Rep. 301. *Holland et al. v. Lee*. *Bridgman's Rep.* 71. S. C. *Holland et al. v. Jackson et al.* *Palmer* 224. *Darcy v. Jackson*, S. C. *Dyer* 90. a. 40, 188.

We claim under a Devise by the Will of one *Broadbent*, in Remainder after an Estate-Tail given to *Pierison*. *Wynne v. Wynne*, H. 17 G. 2. B. R. is in Point to this Case—It was a Writ of Error by a Remainder-Man in Tail: And the very same Error was assigned, as is here *There*, indeed, the *Fact* (of the Vouchee's dying before Judgment) was *denied*: And it was, upon Trial of the Issue, found “that She was alive at the beginning of the Term; “but *died before the Return* of the Summons *ad warrantizandum*.” And the Relation of Law, (which was in that Case insisted upon,) was not permitted to prevail. And the Entry of her Appearance at the said Return (which was there entered on the Record) was holden *not* to be contrary to the Allegation of her Death *before* such Return: *Because* such her Appearance was only entered as BY ATTORNEY; whose Authority ceased by her Death. So that the Error there assigned was *not* an Assignment contrary to the Record.

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* Mr. *Luke Robinson contra*, for the Defendant in Error. Common * P. 411.
Recoveries are *now* considered as Common Assurances; and are therefore to be favoured and supported. Even *another* Warrant of Attorney shall be presumed: Though *One* already appears upon the Record. *

* V. Pigott
168.

1st Objection. *No One* can maintain a Writ of Error upon a Judgment, but *One* who is either *Party* or *Privy*. But this Plaintiff in Error is neither *Party* or *Privy* to, nor *injured by the Judgment* here complained of. It does not appear that *Broadbent*, under whose Will She claims the Reversion, was ever *seised* IN FEE of the Estate: And therefore it does not appear how he had a *Right* TO DEVISE the Estate, in the Manner he has done. They ought to have *shewn* in their Writ of Error, "That he was seised in " FEE:" Which the Defendant *might have traversed*, if it had been so alledged.

2d Objection. No *Scire facias* or *Warning* has been given to the HEIR: Who may be an *Infant*, or may have many Things to plead. *Bernard Lucas*, the Recoveror, is the only Defendant; Who is *only* NOMINAL, but has *no real* Interest.

3d Objection. It appears upon this Record, that *Bernard Lucas* has Judgment to recover against THOMAS COWPER: But *Thomas Peirson* is no Party at all to the Writ. Therefore *Thomas Peirson* (who only came in as Vouchee) had nothing to do with a Judgment against ANOTHER Man. Consequently *Peirson's* Death before Judgment is *no ERROR*: It can be only an *Irregularity*. And NO JUDGMENT is given at all, against *Thomas Peirson*: The Recovery is against *Thomas Cowper*; who is indeed to have Recovery over, in Value, against *Thomas Peirson &c.* But this Recovery over in Value, against *Peirson*, is *not* the Judgment upon which this Writ of Error is brought. *This* Writ of Error does *not tally with the Judgment* of which it complains.

4th Objection. This Error is *not well* ASSIGNED: For it is an Error in FACT; and therefore ought to conclude to the COUNTRY; which this *does not*. *Yelverton* 58. *Rex v. Gosper and Shire*. "When a Man assigns Error in Fact, he ought to put himself *en pavis*." And the Plea of "*in nullo est erratum*" confesses nothing but what is WELL pleaded. And that Case is Word for Word the same with this, as to the Conclusion of the Assignment of Errors: And there was a "*Hoc paratus est verificare*," as well as here is.

Serj.

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* P. 412. * Serj. Poole, in Reply—

1st. It is enough, If We suggest Matter *sufficient to shew* that We are *privy to* and *affected by* the erroneous Judgment. It is sufficient for Us, to shew the Devise of the Remainder to Us; without any Necessity of shewing that the Devisor was *seised in Fee*. And the Precedents are so.—*Wynn v. Wynn* was so. Sir *John Dinely Goodyere's* Case was so. *Darcy v. Jackson, Palmer* 224. is so determined, “That *the Title needs not* to be *set out*, as in a Proceeding to recover *Lands*.” And all the Entries are so.

2dly. The *Scire facias* is brought against the *proper Person*: Which is the *Recoveror*.

3dly *Peirson* appears by his Warrant and vouches: And there is Judgment over, in Value, *against him*.

4thly. There never was, nor properly can be such a *Conclusion to the COUNTRY*. Here is a *new Matter of Fact* introduced: Which the other Party *perhaps will not controvert*. We cannot conclude to the Country, *TILL* the other Party *denies it*.

As to the Case in *Yelverton*—If it be as cited, yet, it can never be supported. The Assignment of an *Error in Fact* ALWAYS concludes with an *Averment*.

LORD MANSFIELD was clear for the Plaintiff in Error, on *all* the Points.

1st. The Writ of Error *needs not* to set forth a *complete Title*: It is only required of the Plaintiff in Error, to shew the *Connexion and Privy* between the Person against whom the Recovery is had, and the Person who brings the Writ of Error. This is *not* like a Proceeding to try the *Right* of the Land, or to recover the *Land itself*. The Precedents are so: And None are produced to the contrary.

2d Objection. No Authority or Reason is produced, for a *Scire facias* to the *Heir*.

3d Objection has no Weight in it: And the Case of *Wynn v. Wynn* is in Point against it.

4th Objection. The Conclusion with an Averment, is right; and gives an Opportunity to try the Fact by the Country, if the Defendant in Error chooses it: Which is all that is requisite.

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* So much as to the *Form*. And

* P. 413.

As to the *Merits*—It is extremely clear that a Remainder-Man *ought* to have this Chance to the Benefit of the Entail; *viz.* To see that all the proper and requisite Forms should be gone through, before He is barred of it.

It is plain that Judgment ought not to be given against any Man, *after* he is *dead*. And there could have been no Judgment against the Tenant to the Præcipe in a Common Recovery, without a Judgment likewise over, in Value, against the Vouchee: They are *all* entered at one and the same Time, and are Part of the *same Proceeding*.

Mr. Just. DENISON concurred—

1st. This GENERAL *Allegation* is sufficient, surely, *in the WRIT*: He needs not shew a *complete Title*. Nay, even in a *Formedon*, I do not know that the Title needs to be completely and fully set out in the WRIT. And *Wynn v. Wynn* is an Authority, on this Head.

2dly. A *Scire facias* to the *Heir* was not necessary; nor any *Warning* to HIM: The *Recoveror* has the *legal Right*; and must be *taken* by the Court, to have the real Interest.

3dly. The *Death of the Vouchee*, before Judgment, is Error in a Common Recovery; and *may be assigned* for such. *Wynn v. Wynn* was in Point, to this.

4thly. The Case in *Yelv.* 58. is so far true, (and can mean no more than) that it ought to be put in a Method of being tried by a *Jury*. And here the Plaintiff in Error has done so: He says “He is *READY to verify it*.” So that the Defendant in Error *might* have put it in Issue, if he had pleased. But he has chosen to plead “*in nullo est erratum*”: Which *confesses the Fact*, and puts the Matter of Law upon the Judgment of the Court.

As to the *Merits*—The Remainder-Man has a Right, both in Law and Justice, to reverse the Recovery, if it be erroneously suffered.

Mr. Just. FOSTER and Mr. Just. WILMOT declared their clear Concurrence in Opinion with LORD MANSFIELD and Mr. Just. DENISON.

Per Cur. clearly and unanimously
JUDGMENT REVERSED,

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* P. 414.

Friday, 25th
November
1757.

* Windham Esq. *vers.* Chetwynd Esq.

Pasch. 28 G. 2. Rot'lo 53.

A Special Verdict upon a Will of Land, dated the 14th of May 1750; and a Codicil of the same Date, made by *Walter Chetwynd* late of *Grendon*, Esq;

The Special Verdict—At which Day, before our Lord the King at *Westminster* come as well the said *William Wyndham Malachi Lindon Catherine Lindon Thomas Stevens* alias *Walter Paris* alias *Walter Chetwynd Susannah Blacknell Henry Perrot George Huddleston* and *James Crofts* by their Attorney, as the said *William Henry Chetwynd* by his Attorney. And the Jurors &c, being summoned &c, do come &c, and being elected &c, do find, As to the first Issue joined between the said Parties, that the said *Walter Chetwynd* was, at the Time of making the said Writings importing to be his last Will and Codicil, of sound Mind. As to the third Issue, they find that the Testator did not, by the said Writing importing to be his last Will, Devise to the aforesaid *William Wyndham* and his Heirs any Lands or Tenements in the County of *Warwick*, In Trust or for the Benefit of the said *Thomas Stevens* alias *Walter Paris* alias *Walter Chetwynd*. And as to the Fourth Issue, the Jury find that the Testator did not, by the said Writing importing to be his last Will, Devise to the said *Catherine*, now *Catherine Lindon* the Wife of the said *Malachi Lindon*, an Annuity of 200 *l.* by the Year, for the Term of her natural Life. And as to the second Issue, the Jury find that the Testator was in his Life Time seised in Fee of certain Lands Tenements &c, in the several Counties of *Warwick* and *Stafford*, of the yearly Value of 3100 *l.* and being so thereof seised, he the said *Walter Chetwynd*, in his Life Time, signed sealed and published a certain Paper Writing bearing Date the 14th Day of May 1750, purporting to be his last Will and Testament, and likewise another Paper Writing purporting to be a Codicil indorsed on the said first-mentioned Paper Writing, and of the same Date; (which Will and Codicil it sets out *in hæc verba*;) And in the former, there is a Charge upon the Residue of his *Real* and personal Estates, for the Payment of all his just *Debts*, Legacies, and Incumbrances: And that the said Paper Writings were so signed &c, by the said *Walter Chetwynd* in the Presence of *Stafford Squire*, *Robert Baxter*, and *Josiah Higden*; who likewise attested the same at his Request, in his Presence, and in the Presence of each other. And they further find that the said *Stafford Squire* and *Robert Baxter*, being Attornies at Law, were in or about the Year 1747, employed by the

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the said *Walter Cbetwynd* to solicit a private Act of Parliament “ for * P. 415.

“ Sale of the Estates late of *Henry Fleetwood* Esq; deceased, in the
“ County of *Lancaster*, forraising Money to discharge Incumbrances
“ affecting the same &c.” And that the said *Stafford Squire* and
Robert Baxter charged the said *Walter Cbetwynd* Debtor in their
Books, for the Fees and Expences of passing the said Act: And
which Charge continued so, until and after the Death of the said
Walter Cbetwynd. And that at the said Time of the said signing
sealing and publishing of the said several Paper Writings, and also
at the Time of the Death of the said *Walter Cbetwynd*, there was due
and owing to the said S. S. and R. B. for the said Business done, the
Sum of 318*l.* and that some Time after the Death of the said *Walter*
Cbetwynd, the said S. S. and R. B. delivered a Bill for passing the said
Act to the Trustees nominated and appointed in and by the said Act of
Parliament for the Purposes therein mentioned: and afterwards, and
before the examination of the said S. S. and R. B. in this Cause the
said S. S. and R. B. received from the said Trustees, at several different
Times, several Sums, amounting in the whole to 302*l.* 4*s.* 8*d.* ¼
and that the said Trustees were willing to have paid the Remainder,
if it had not been for a Miscalculation. And the Jury further find
that in the said private Act of Parliament there is contained a certain
Clause for Payment of the Expences attending the said Bill: (which
Clause they find in *hæc verba*.) They further find that at the
Time of the signing sealing publishing and attesting the said Paper
Writings, there was a current Account open and subsisting between
the said S. S. and R. B. and the said *Walter Cbetwynd* for other Bu-
siness exclusive of the Expences of passing the said private Act:
on the Balance of which Account, if stated at that Time, the said
S. S. and R. B. were indebted to the said *Walter Cbetwynd* in the
Sum of 138*l.* 14*s.* 10*d.* They further find that at the said Time
of the attesting of the said Writings, and also at the Time of the
Death of the said *Walter Cbetwynd*, there was due and owing from
him to the said *Josiah Higden*, his Apothecary, the Sum of 18*l.* 5*s.* 5*d.*
on simple Contract: Eleven Pounds whereof were so due on 25th
December 1749, and before the last Sickness of the said *Walter Cbet-*
wynd. They also find that the said *Walter Cbetwynd* died on the
17th of May 1750, without Issue, and seised &c: and that the said
William Henry Cbetwynd is the only Brother and Heir at Law of
the said *Walter Cbetwynd*. They further find that his real Estate
at the Time of signing &c, and also at the Time of his Death, was
subject to certain Mortgages made thereof, by the said *Walter Cbet-*
wynd to the Amount of 19000*l.* And of 5000*l.* more, made by
the said *Walter Cbetwynd*'s late Father. And that the said *Walter*
Cbetwynd owed at the Time of his Death, by Bonds, the Sum of
1600*l.* and by simple Contract 2874: and that his personal Estate
then amounted to 13972*l.* and was sufficient to pay all the simple
Contract

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* P. 416. Contract Debts and Bond Debts of the said *Walter Chetwynd*. And that the several real Estates so in Mortgage were of Value more than sufficient to satisfy the several Incumbrances affecting the same. The Jury further find that on the 2d of *August* 1750, the said *William Henry Chetwynd* filed his Bill in Chancery against the said *William Windham &c*, for the obtaining a Decree and Recovery of the said Lands &c; and thereby contested the Validity and due Execution of the said Paper Writings. That Answers were put in, and Amendments made to the Bill; and other Answers put in: and the said *William Henry Chetwynd* prosecuted the said Suit in Chancery with all due Diligence. The Jury further find that the said *William Windham*, as Executor of the said *Walter Chetwynd*, paid to the said *Josiah Higden* the said Sum of 18 l. 5 s. 5 d. after the Death of the said *Walter Chetwynd* and before the Examination of the said *Josiah Higden* in this Cause: And that the said *J. H.* had not, at the Time of his Examination in this Cause, any Demand upon the said *Walter Chetwynd*. But whether upon the whole Matters aforesaid by the Jurors in Form aforesaid found, the said Paper Writings or either of them were or was DULY EXECUTED by the said *Walter Chetwynd*, so as to pass Lands or Tenements, or not, the said Jurors are wholly ignorant; And therefore pray the Advice, &c, &c.

This Case was argued twice; 1st. on *Friday* the sixth of *May* last, by Sir *Richard Lloyd* for the Plaintiff, and Mr. *Clayton* for the Defendant; and again, on *Friday* the 18th Instant by Mr. Serjeant *Prime* for the Plaintiff, and Mr. *Norton* for the Defendant.

The principal Objection insisted upon by the Counsel for the Defendant, was "That the subscribing Witnesses to the Will were not, " at the Time of their ATTESTATION, *credible* Witnesses:" And consequently, this was not a good Will of Lands, within the Statute of 29 C. 2. c. 3. for Prevention of Frauds and Perjuries; as not being attested by three *credible* Witnesses.

In Proof of which, they urged many Arguments, and reasoned from several Cases: And, amongst others, they cited two Cases as in Point; viz. *Hilliard v. Jennings*, reported in 1 *Ld. Raym.* 505, *Comyns* 92, *Carthew* 514, and Cases in *B. R. temp. W.* 3. page 277; And *Holdfast ex dim' Ansley et Ux' v. Dowling*, in 2 *Strange* 1253.

But it would be unnecessary to prefix either the * Arguments of the Counsel, or the Authorities upon which they relied; As Lord *Mansfield* entered into the Case so very minutely, in delivering the Opinion of the Court upon it.

* See a short Summary of them, in Dr. *Mansfield* entered into the Case so very minutely, in delivering the Opinion of the Court upon it.

pa. 532

After the Court had taken some Time to consider of it, they all agreed that the Will was *duly* attested by three *credible* Witnesses. And now

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* LORD MANSFIELD delivered the Opinion of the Court, to the * P. 417.
following Effect,

The Doubt made by this Special Verdict sprung, after the Cause of *Ansty v. Dowling*, out of the *General Question* then much agitated, "Whether a Benefit given to a subscribing Witness by the Will, either under a general or particular Description, should annul his Attestation, *As at the Time of his SUBSCRIBING*; and make the Will wholly and absolutely void, for Want of Form, as much as if he had never attested at all; *though at or after the Testator's DEATH*, He might be *disinterested*, and *competent* to be examined in Support of the Will."

This *general Point* is the Basis of the Objection to these subscribing Witnesses. Unless the Defendant can support it, He has no Ground to stand upon: But though He should succeed in the *general Proposition*, the Application to *this Case* may fail, from the *particular Circumstances*, and the *Kind of Benefit* objected.

The Question does *not* depend upon the Construction of any Words of the Statute. The Statute is silent as to the *Capacity* of the Witnesses: It declares no Incapacity; It requires no Qualification.

The Epithet "*Credible*" has a clear precise Meaning. It is not a Term of Art appropriated only to legal Notions; but has a Signification universally received. It is never used as Synonymous to *Competent*. When applied to Testimony, it presupposes the Evidence *given*.

After the Competence of a Witness is allowed, the Consideration of his Credibility arises: And *not before*. Persons undoubtedly credible *cannot* be Witnesses, *under particular Circumstances*: Persons manifestly incredible *may* be, and *often are* Witnesses.

In Acts of Parliament which direct Convictions upon the Oaths of Witnesses, the Epithet "*Credible*" is added; but by no Means intended to signify "*Competent*:" *That* is implied in the Term "*Witness*." But it is intended, (from abundant Caution,) to declare, That though competent Witnesses swear positively, their *Credibility is to be weighed*: And if the Magistrate thinks the Evidence *not credible*, He ought not to convict.

In *this Sense*, it was very unnecessary to add the Epithet, here, to subscribing Witnesses. And yet, to make the essential Solemnity of the Will depend upon the *Credibility* of the Subscribing Witnesses, is so absurd; that their Credibility has always been held to make *no Part* of the necessary Form.

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* P. 418. * If they all swear that the Testator did not execute; If they had, at the Time, the worst Characters, and had committed the most infamous Actions; yet their Attestation answers the necessary Form; Because the Testator meant to comply with the Law, and might not know them to be bad Men.

* 3 Co, 36. b. The 3d Rule or Caution in making Wills, given at the End of *Butler and Baker's Case*, * is—" At the Time of the Publication of the Will, Call *credible* Witnesses to subscribe their Names to it." Lord *Coke* certainly meant "Persons of Credit and Character."

From hence, and from the Usage in Penal Acts directing Convictions, I am persuaded that the Epithet was inserted here, as a Word of Course, and misapplied. Had the Operation or Effect of the Word, in this particular Case, been attended to, it never could have been inserted; because, in the *natural* and *obvious* Sense, the Meaning must be rejected, from the Consequences it would have: And in *any other*, it has no Meaning at all; For, Suppose it to signify *competent*, Competence is *implied* in the Term "Witnesses."

This *whole* Clause, which introduces a positive Solemnity, to be observed, not by the Learned only, but by the Unlearned; at a Time when they are supposed to be without legal Advice; in a Matter which greatly interests every Proprietor of Land; where the Direction should be plain to the *meanest* Capacity; is so loose, that there is not a single Branch of the Solemnity defined or described with sufficient Certainty to convey the same Idea to the *greatest* Capacities.

There have been Litigations, and contradictory Opinions, upon *almost every Part* of the Form; as "What is *Signing* by the Testator? Whether the Witnesses are to attest *uno* Contextu, *uno eodemq;* Tempore? Whether they are to *see* the Testator sign? Whether they ought to know that He signs it *as his Will*? Whether he ought to publish it *as his Will*?" A very little Precision, and a very few Words, might have prevented all these Questions.

In a Clause not the most accurate, I can easily believe that the usual Epithet "*Credible*" slipped in, as of Course, without Attention to the *Impropriety* of using it on this Occasion.

It has been said "that this Act of 29 C. 2. c. 3. was drawn by "Ld. Ch. J. *Hale*;" But this is scarce probable, since it was not passed till after his Death: And it was brought in, in the Common Way; and not upon any Reference to the Judges.

But

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* But what Sense soever is put upon this Word "*Credible*," the * P. 419. Statute leaves the Question just as it was: For it does not declare who *are*, or are *not* credible; or, (if it is supposed to mean *competent*,) who are competent, or who are *incompetent*.

Their Competence could not be referred to any Law then established: because there was, there could be, none applicable throughout to this New Case. The Necessity of subscribing Witnesses to any Instrument, never had existed before, in *this* Country. There never could have arisen, in the Law of *England*, a Question, "concerning the Competence of a Witness, at the Time of his knowing the *Fact*, he came to testify;" but only "whether he was competent at the Time of his *Examination*."

The Time of *Examination* could not possibly be the Criterion upon which the Validity of the Will was to depend. The Witnesses might *not live* to be examined: Their Incompetence to be examined, might arise *long after* their Attestation.

"What Objection therefore to the subscribing Witnesses, should be sufficient to avoid a Will, as *informal*," was left to be judged of as Cases should arise; by general Principles, by Analogy to the Law of Witnesses in other Instances, and by Arguments drawn from the Nature and Fitness of the Thing, with regard to Justice, Convenience, and the Intent of the Statute.

When solemn Determinations, acquiesced under, had settled precise Cases, and become a Rule of Property; they ought, for the Sake of Certainty, to be observed, as if they had originally made a Part of the Text of the Statute.

I will therefore consider the *General Question*, in two Views:

1st. Supposing there had been *no Judicial Determinations* relative to the Capacity of subscribing Witnesses since the Statute;

2dly. Upon the *Foot of the Judicial Determinations* that have been since the Statute. And

3dly. In the last Place, I will consider the *particular Case* now in Judgment, under all its own Circumstances.

First—Considering the Matter *at large*; Let me observe that the Power of Devising ought to be favoured.

It is a natural Consequence of Property, and the Right a Man has over his *own*. It was a Right by the Law of the Land, before the

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* P. 420. * the Conquest, and down to about the Time of *Henry* the 2d—It ceased, consequentially only, by the Introduction of Feodal Tenures; because, originally, every Species of Alienation was contrary to that System.

As soon as the Power of Alienation *inter Vivos* was indulged, Testaments followed, indirectly, as Declarations of Uses.

The Statute of *Uses* accidentally checked this Form of Devising. Therefore the Statute of *Wills* was made.

The 29 *Car.* 2. c. 3. (which gives Rise to the present Question,) did *not* mean to *restrain* Testamentary Dispositions of Land: The Reasons to encourage that Power were *increased*.

The Policy of Tenures, from whence arose the Impediment to Wills, was abolished; but had left many Consequences remaining, which made Testamentary Dispositions of *Land*, more reasonable than they were among the *Greeks* and *Romans*, or here before the Conquest.

The Eldest Son only is Heir, *ab Intestato*. Among Collaterals, not all the next of Kin, but One often is Heir; to the Exclusion of many in the same, and many in a nearer Degree. Simple contract Creditors had no Right to be paid their Debts. Money invested in Land could not be traced. Much Land was in Trust: Where the Widow had no Right to Dower.

In *personal* Estates, the Succession *ab Intestato* is subject to all Debts, and governed by natural Family Equity.

In *real* Estates, the Succession is governed by political Consequences of a positive System: Which make the Testamentary Power often necessary, to enable a Man to do Justice to his Family, and his Creditors.

The Legislature meant only to guard against Fraud, by a Solemn Attestation; which they thought would soon be universally known, and might very easily be complied with. In Theory, this Attestation might seem a strong Guard; It may be some Guard in Practice; But I am persuaded many more fair Wills have been overturned for Want of the Form, than fraudulent have been prevented by introducing it.

I have had a good deal of Experience at the Delegates; and hardly recollect a Case of a forged or fraudulent Will, where it has not been solemnly attested. I have heard eminent Civilians who are dead, and some now living, make the same Observation.

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* Suppose the subscribing Witnesses honest ; how little need they * P. 421.
know ? They do not know the Contents ; they need not be together ; they need not see the Testator sign ; (if he acknowledges his Hand, it is sufficient ;) They need not know it to be a Will ; (If He delivers it as a Deed, it is sufficient.)

For these and many more Reasons, it is clear That Judges should lean *against* Objections to the Formality. They have always done so, in every Construction upon the *Words* of the Statute : *à fortiori* ought they to do so, in raising a consequential System, *not* prescribed in Words. And still more ought they to do so, if that System would spread a Snare, in which many honest Wills must unavoidably be intangled ; and be no Preservative against Fraud.

At the Time this Act was made, the Law rejected no Witness to prove a Will ; Unless, at the *Time of his Examination*, his Testimony tend to support his own Title, and enable himself to hold or recover an Interest under it.

In the Ecclesiastical Court, the Probate is conclusive to every Body as to every Part. If a Legatee came to prove it, He intitled himself to his Legacy. But if the Legacy was contingent, and at the Testator's Death could not take Effect ; if he had the same or a greater Interest, though the Will should be set aside ; He was a Witness : A Release, Payment, or Tender, made him a Witness.

In the Courts of Common Law, where the Witness had a Charge upon Land devised to another, He was just in the Case of a personal Legatee. If he had as great an Interest the other Way ; if his Interest at the Testator's Death could never take Effect ; if there was a Release, (of which several Authorities were cited ;) and I will add, as by necessary Consequence, if there was Payment or Tender ; He was a Witness.

Nice Objections, of a remote Interest which could not be paid or released, though they held in other Cases, were not allowed to disqualify a Witness in the Case of a Will : As * Parishioners might prove a Devise to the Use of the Poor of the Parish for ever.

[* V. 2 Sid.
109. M. 1658
Townsend v.
Row.]

Before the Statute, No Man could, in a Court of Justice, intitle himself by his own Examination, to a Devise. So, after the Statute, No Man should intitle himself, in a Court of Justice, to a Devise, by Virtue of his own Subscription, which at the Time of Subscribing, He could not have proved by his Examination.

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* P. 422. The Disability of a Witness from *Interest*, is very different from a *positive* Incapacity. If a Deed must be acknowledged before a Judge or Notary Public, Every other Person is under a *positive* Incapacity to authenticate it: But Objections of *Interest* are Deductions from natural Reason, and proceed upon a Presumption of too great a Bias in the Mind of the Witness, and the public Utility of rejecting partial Testimony.

Presumptions stand no longer than till the contrary is proved.

The Presumption of Bias may be taken off, by shewing the Witness has as great, or a greater Interest the other Way; Or that he has given it up.

The Presumption of public Utility, may be answered, by shewing that it would be very inconvenient, under the particular Circumstances, not to receive such Testimony.

Therefore from Necessity, the Course of Business, and other Reasons of Expedience, Numberless *Exceptions* are allowed to the *general* Rule.

The Presumption of Bias arises as at the Time of *subscribing*. But it may be answered.—If Part is devised to a subscribing Witness, The Presumption is answered, by shewing he was Heir at Law; or that the Devise is void; or that he has renounced it.

Where is the Reason to say that a Witness who does not know the Contents of a Will during the Testator's Life, and at his Death takes no Benefit, was biased at the Time he subscribed, or can be biased at the Time of his Examination?

During the Life of a Testator, Devises are mere Possibilities: No Interest can vest till his Death. The Presumption of Bias from the *Possibility*, is answered by the Fact when it *becomes* an Interest, His Swearing when he is totally *disinterested*, is conclusive, that the Possibility is *not* to be presumed the corrupt Cause of his subscribing.

For the sake of third Persons, It is wise and just, to allow the Objections thus to be purged: Otherwise, many Settlements by Will must be overturned, to the Ruin of Families.

It is natural and usual to give Legacies to Servants, and Tokens to Friends.—Persons under these Descriptions are most like to be Witnesses. Ought such Trifles to overturn *unavoidably* the most deliberate Dispositions of the greatest Estates? Which may be attended

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* tended often with this Family Distress, That a Man may have * P. 423.
given his Money to One Part of his Family, and his Land to
Another: In which Case, the Will would be good as to the Mo-
ney; and void, as to the Land.

If the Legislature had *said so*, That would have been a *positive*
Rule: But it is contended for, by *Construction*, and to *guard against*
Fraud.

It is not a Guard, even in Theory, in the Case of *Legatees*: Be-
cause, they may, in another Shape, attest the Devise which charges
the Land with their Legacies.

It is settled, "That where the Land is once charged, (and it al- *See 2. Atk. 268.*
ways is an auxiliary Fund,) with the Payment of Legacies, by a *2. Ker. 207.*
solemn Devise, The Legacies may be given, altered, or revoked by *665.*
a subsequent Will *unattested*." The fraudulent Legatee might at-
test the Charge, and get his Legacy in a Codicil unattested.

Let a Will be ever so fair, a Slip in Form is fatal: Which is a
certain Mischief. But if a Will be fraudulent; though it is al-
lowed to be formal, It may be set aside upon Evidence and Circum-
stances.

Neither Reason, nor Policy requires the Objection to be carried
farther than I have laid it down; agreeable to the Law before the
Statute, and the universal Maxim, "*Testis in propria Causa non*
"*est adhibendus*."

But *if* Judicial Determinations, acquiesced under, and become a
Rule of Property, since the Statute, have *extended the Incapacity*
further, They must be adhered to. Which brings me

Secondly, To consider the *Judicial Determinations* since the
Statute.

All the Determinations *agree exactly* with these Principles.

In many Instances, the Presumption of *Bias from a Legacy*, at
the Time of subscribing, has been allowed to be *taken off* by a
Release. Authorities in print have been cited, to shew "this was
"considered as a settled Point:" And I verily believe it was so,
from the Authority of the oldest and most eminent Practisers in
Westminster-Hall; and therefore I give Credit to the Dictum of
Powys in Viner, * "That it had been solemnly agreed by the
"Judges, That, where a Person had a Legacy given, and did *release*
"it, He was a *good* Witness to prove the Will."

* See Viner's
Abridgment,
Title Evi-
dence, page
I 14. N^o 53.

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* P. 424. * I know that before the Case of *Ansty v. Dowling*, a Will of a very great Estate was liable to the Objection; and the Heir at Law would have contested it: But as it was certain the Witnesses would be paid, or release, No Opinion that he took, encouraged Him to think it worth his while.

Mr. *Fazakerly* and Sir *Thomas Bootle* have told me, they took it to be settled: And indeed the Number of Wills where the Objection lay and never was taken, demonstrated it.

There is not a single Determination which carries the Incapacity farther than the Rule I have laid down; *viz.* "That a Person shall not, in a Court of Justice, intitle himself to a Devise, by Virtue of his own Subscription, which at the Time of subscribing He could not have proved by his Examination.

That is the Case of *Hilliard v. Jennings*. That is the Resolution and Judgment of the Court in the Case of *Ansty v. Dowling*. There, the Defendant was Devisee; subject to an Annuity of 20 *l.* a Year to *Eliz.* the Wife of *John Hailes*, for her Life, for her separate Use: And there did not appear to be any personal Estate. Her Interest was a Charge, in the Nature of Legacy, to be paid by the Defendant out of the Estate devised to him: And being for her separate Use, it was a Trust; and the Defendant was her Trustee. Upon the Validity of the Devise to the Defendant, Her Annuity depended. if he succeeded, *her* Title followed of Course; for he must take the Land, *as* the Testator gave it, subject to the Charge and Trust: And upon the Devise to the Defendant being found good at Law, a Court of Equity must, of Course, have decreed the Trust. So that *She* was the *Cestuy que Trust* of the Party to the Cause; and *either* way, the Judgment would immediately affect her Interest.

In Matter of Evidence, *Husband and Wife* are considered as *One*; and *cannot be Witnesses*, the *one* for the *other*. The Husband cannot be Witness *for his Wife*, in a Question touching her *separate* Estate,

There was *no Release*. There could be *no Payment*, or *Tender*, without the Interposition of a Court of Justice; because the Value depended upon incertain Estimation: But no Attempt had been there made to wards paying, or tendering the Value of the Annuity.

This brought it precisely to the Case of *Hilliard v. Jennings*: The Witness, in a Court of Justice, was to support a Devise to himself, by Virtue of his *own* Subscription; (for the Case is the same

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* same, as if the *Wife* had been the *Witness*, or the *Husband* the * P. 425. *Devisee* of the Annuity.)

It is true that *Ld. Ch. J. Lee*, in * delivering his Opinion, argued as if the Objection of Benefit from the Will to the Witness, at the Time of subscribing, could *not* be answered or taken off by any subsequent Fact: Which He grounded upon the Authority of the *Roman Law* from the Digest, and Code; where it is said “*Conditio-
tionem Testium tunc inspicere debemus, cum signarent, non mor-
tis Tempore.*” But the Sense of this Passage was not enough considered.

* That Opinion was delivered by *Ld. Ch. J. Lee*, on Tuesday 22d April 1746. P. 19 G. 2.

“*Conditio Testium*” here means the *positive Capacity* of the Witnesses; their Rank, or Quality, as Freemen, Citizens, Adult.

There *never* was a Time, in the *Roman Law*, when *Interest under the Will* was any Objection to subscribing Witnesses.

To explain this a little farther—

The Essence of the *Roman Testament* was the Appointment of an Heir, to represent the Testator.

Before the 12 Tables, the Testamentary Heir might be made *Two Ways*; in *Prociñtū*, as *Plutarch* describes at the Siege of *Corioli*; or in the Form of a Legislative Act, in *Comitiis calatis*.

The 12 Tables gave an absolute Power to every Man, to make the Law of his own Succession; But prescribed *no Form*.

As a Testament was an Alienation of the Testator's Property and Family after his Death, The Form of Mancipation *per Æs et Libram*, used in *other* Transfers of Property or Family, was followed in *this*: The Heir was supposed to *buy*, and the Testator to *sell* his Succession and Family, for and as representing their Families. The Ceremony was transacted with all the Symbols of a Sale; in the Presence of the Officer who held the Balance, and of *Five* Freemen, Citizens of *Rome*, 14 Years of Age at least, solemnly required to bear Witness.

These Ceremonies and Symbols were invented *before* Instruments in *Writing*: And this imaginary Sale, *per Æs et Libram*, was used in Alienations, Adoptions, and almost every Species of Change of Dominion, or Property strictly so called, (“*Proprium est quod Quis Librâ mercatur et Ære,*”) and in many other Contracts.

Subsequent Laws and Usages, especially *after* Testaments came to be in *Writing*, took away the Ceremony of the *Symbolical Sale*, added *two* Witnesses more, and prescribed *Forms of Attestation*;

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* P. 426. * But left the *Condition of the Witnesses*, the same: They must be Freemen, Roman Citizens, Adult & *Testabiles*. Yet by an equitable Construction, *General Reputation* was sufficient: As where the Witness, whom *Every Body considered* as a Freeman, really was a Slave.

This was the *Conditio Testium*, and must exist at the Time of subscribing: As much as where there is a Custom to surrender into the Hands of 2 Copyholders out of Court, they must be Copyholders at the Time.

Though in other Cases, the Objection of *Interest*, to a Witness, was allowed; It did not incapacitate Witnesses to a WILL.

While the Testament *per Æs et Libram* continued, neither the Testator, or Heir, or any of the Families of either, could be Witnesses; because they were supposed the *Parties* to the Contract.

When the Symbolical Sale ceased, and Testaments were in *Writing* and *secret*, The Heir Himself was a sufficient subscribing Witness. Afterwards, though the Will was *open*, and He knew the Contents, He was a sufficient subscribing Witness: As appears from Cicero for Milo, speaking of Cyrus *—“*Unà fui; Testamentum simul obsignavi cum Clodio; Testamentum autem palam fecerat, & illum Hæredem & Me scripserat.*”

* 6. Vol.
4to. Oliv.
Edit. pa. 253.
Sect. 18.

Justinian Inst. Lib. 2. Tit. 10. § 10. recites the Heir having been allowed to be a Witness; but forbids it, (not upon the Foot of his being interested, but) “*ad imitationem pristini familie Emptoris; quia hoc totum Negotium, Testamenti ordinandi gratia, creditur hodie inter Testatorem & Hæredem agi.*” But in the next Section (§ 11.) He expressly allows the *Cestuy qui Trust*, and *Legatees*, to be subscribing Witnesses; “*Quia non juris Successores sunt.*” And yet the Heir might be merely a Trustee for the whole Inheritance to be delivered to the *Cestuy qui Trust*; and the Legatee might exhaust the whole Estate.

This abundantly shews that the Passage from the Code and Digest did *not* relate to Witnesses being INTERESTED.

And the Code and Digest are consistent with the Institutes, on this Head.

The Code, Digest, and Institutes are all one connected Work.

The Code was first published in the third Year of *Justinian*: The Digest was compiled before the Institutes; but published a Month after, in the seventh Year of *Justinian*.

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* The Proposition, "that any kind of Interest, at the Time of sub- * P. 427.
"scribing, could not afterwards be taken off;" and the Application
of this Passage in support of it, was much agitated in *Westminster-*
Hall and the whole Kingdom.

A Gentleman at the Bar, pursuing the Proposition through all its
Consequences, hit upon this Point—"That a *Charge upon Land* for
"Payment of *Debts*, would defeat the Will, if a subscribing Wit-
"ness, was a *Creditor* at the *Time of Subscribing*." As soon as it
occurred to him, He mentioned it to Me. There had been many
such Devises: But the Question, "Whether the Witness was a Cre-
"ditor," never had been asked at Law; nor by Interrogatories in
Chancery, framed to establish or impeach a Will.

If the General Rule was right, the Deduction seemed very plau-
sible.

He put this Point in Issue, in Chancery; and examined to it, in
Behalf of the Heir, in several Cases. Lord *Hereford's* Will was
one of the first: *This* was another.

A Case soon happened which brought the General Proposition
flung out by Ld. Ch. J. *Lee*, under *Judicial* Examination. On the
10th of *February* 1746, The Earl of *Ailesbury* died; having made a
Will, 15th *May* 1746, * of his whole Estate real and personal, char-
ged with Debts and *Legacies*: The Three subscribing Witnesses, as
being in his Service at his Death, had *Legacies*; One, 30 *l.* a Year
for Life; the other two, pecuniary *Legacies*. All three released,
the 12th of *February* 1746.

He had made a former Will, on the 20th of *December* 1744,
attested by 3 disinterested Persons; under which, the 3 Subscribing
Witnesses to the last Will would have had the *same* *Legacies*.

A Bill was brought in Chancery, to have the Latter Will esta-
blished, notwithstanding this Doubt; and stating the whole Matter.
Notwithstanding the Will of 1744, which the Testator had re-
voked, (as He thought, effectually,) and might probably have can-
celled; It was a Benefit to the Witness, at the *Time of Subscribing*,
to have a Legacy under the last Will.

The Cause came on to be heard, the 5th of *November* 1748.
And I was of Counsel, in it.

I had taken the Liberty to ask Mr. Justice *Denison*, "Whether
"the Judgment of the Court, in the Case of *Ansty v. Dowling*
"went

* I believe
this is right;
notwithstand-
ing the Cor-
rection of the
Editor of Ld.
Camden's
Argument,
in his pa. 21.
of his 1st.
part.
N. B. May
1746 was
prior in time,
to February
1746.

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* P. 428. * “ went upon the *General Proposition*.” He told me it did *not*; but upon the *particular Circumstances*. As to himself, He was *not* of Opinion, “ that an Objection of Benefit, at the Time of Subscribing, *might not be taken off*, by being disinterested, at, or after “ the Death.”

I mentioned this to the Lord Chancellor, who had got from Ld. Ch. J. *Lee*, a Copy of the Opinion He delivered: And He was, clear, “ *they were good Witnesses*.” At the *Death* of the Testator, it was indifferent to them, *which Will* prevailed: Besides, they had *released*. He declared the last will, of the 15th of *May* 17 46, to be *well proved, established it, and decreed the Trusts*.

There is another Matter touched in that Opinion delivered by Ld. Ch. Just. *Lee*, which interferes with the Rule I have laid down, in it's *full Extent*: *viz.* “ That a subscribing Witness who is a *several Devisee*, which Devise *as to him* must be void, shall not by his “ Subscription authenticate the *Rest* of the Will.” But, for this, no Authority is cited. In the Case of *Hilliard v. Jennings*, the whole Land was devised to *William Hilliard*. And I am satisfied that Ld. Ch. J. *Holt* took the Distinction, “ That the Will might “ be only void, *quoad the Devise to the Witness*.” Beause *Cartbew*, [*pa.* 514.] who was Counsel in the Case, and has reported it the most correctly, *hints* an Expression of that kind, *viz.* “ That it was void “ *quoad the Devise of the Lands to the Plaintiff*,” And Ld. *Raymond*, in the Case of * *Baugh v. Holloway*, says *expressly*, “ That “ Ld. Ch. J. *Holt* so determined.”

* 1 Peer:
Wms. 557,
558.

The Validity of the Will, as to the *Personal Estate*, was not before the Court, and never could come before the Court, because *that Question* belonged to another Jurisdiction. The Case in Judgment was of a Devise to the Witness *only*. Ld. Ch. J. *Holt* might, very properly, throw out something to guard against Inferences from their present Determination, to the Case of a Devise to a *third Person*.

I have looked into the Register-Book, for that Case of *Baugh* and *Holloway*; and find the State of it to be this—*Richard Baugh* died, leaving *Elizabeth* his Wife, and two Sons, named *John* and *George*; having first made his Will, dated 11th *June* 1707, whereby he devised certain Premises to his youngest Son *George* his Heirs and Assigns, charged with the Payment of 200 *l.* which was due on Bond to *Lancelot Baugh*, the Testator's younger Brother. And the said Testator also devised certain other Lands, to the said *George*, with a Proviso, that on the said *George's* attaining 21 and having 1000 *l.* paid him, then all the said Premises should return to his eldest Son *John*. And in Case both his said Sons should die under

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* 21 and unmarried, then the said Testator devised the said first mentioned Premises to his Wife *Elizabeth* her Heirs and Assigns, charged with the Payment of the said 200 l, to the said *Lancelot Baugh*, and also with the Payment of 150 l, to the said *Lancelot Baugh's* Children; and devised the said last mentioned Premises to his Brother *Edward Baugh* his Heirs and Assigns. Both the Testators said Sons died without Issue, under Age: And *Elizabeth Baugh* possessed and enjoyed the said Premises under the said Will, and afterwards died, 20th *October* 1714; having first made her Will, and devised the said first mentioned Premises to *Catharine Rawlins*, charged with the Payment of her Debts, and also subject to the said charge made by her Husband's Will. *Catharine Rawlins* entered, and enjoyed the said Premises, and died; having made her Will dated 26th *May* 1716, and devised the said Premises to *Anne Oxenden* and *Elizabeth Holloway* as Tenants in Common, charged with the Payment of the Debts and Legacies appointed to be paid thereout by the said *Richard Baugh*, and also of the Debts, &c, of the said *Elizabeth* unsatisfied by the said *Catharine Rawlins*. The said *Anne Oxenden* and *Eliz. Holloway* claimed the said Premises, as only Children of *John Holloway* by *Anne* his Wife, and as Co-heirs at Law of the said *Eliz. Baugh* and *Cath. Rawlins*. *Lancelot Baugh* filed his Bill, and claimed as Uncle and Heir at Law of *John Baugh* the surviving Son of his Brother *Richard Baugh*; thereby impeaching his said Brother's Will. * P. 429.

The order is stated right in 1 *Peere Wms.* 558: And on searching the Register's Book, it could not be found to have come on again. Therefore it is reasonable to think the Heir must have been advised to drop it.

Devisees of Lands differ extremely from *Wills*. They are no Appointment of an Heir; They create no Representation; The Devisee does not stand in the Place of the Devisor, as to simple-contract Debts; and till the * Statute of King *William*, the Devisee was not liable to Specialty Debts, (because he was considered as an Alienee, and not as the Heir.) They are Conveyances or Dispositions *Mortis Causa*: And that is the Reason why a Man cannot devise Land which he shall afterwards acquire. * 3. 4 W. & M. c. 14.

One Devise may be void, (as in the Case of this very Will;) and the Devise of another Estate, good. There is no Probate of the whole Instrument: Every several Devisee must make out his Title, in a distinct Cause, and *de novo*. against every new Party.

Upon legal Principles, there is great Weight in the Distinction said to have been made by *Ld. Ch. J. Holt*: And the Authors referred to by *Swinburne* are strong, upon the Reason and Fitness of the Thing.

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* P. 430. * The Danger of Fraud, from the Imagination "that four Witnesses might * divide the Estate among them," seems very chimerical. That very *Contrivance* would overturn the Will. If it would not; they might as well execute their Scheme, by four Devises, in four Paragraphs, severally attested.

* By contriving to attest, each for the three others, as to the Lands devised to those others; though none of them could be a good Witness as to the Devise to Himself.

Thirdly—In the third and last Place, I proposed to consider the present Case under its *own* Circumstances.

These Witnesses are in the Nature of *Legatees*; not several *Devisees*.

The Presumption of "Interest at the Time of *Subscription*" is *taken off*, at the *Death*, by the principal Funds being more than sufficient: It is taken off, *before the Trial*, by the Debts being *paid*.

But the Benefit at the Time of subscribing was *Nothing*. It does not appear the principal Funds *then* were deficient. The Legacy is a *bare Possibility*, upon a Contingency; which Contingency *never happened*.

But I will go farther, I think a *Charge "to pay Debts"* ought *not* to incapacitate subscribing Witnesses; *although* they wanted and claimed the Benefit of it. Every Honest Man should make that Charge in his Will: He who omits it, is said to sin in his Grave.

Fraud can not be presumed, from inserting a Clause which it would be iniquitous *not* to put in.

No Man would resort to wicked and fraudulent Practices, to get his Debt charged upon Land by the *Will* of his Debtor: If he suspected the Debtor's Circumstances, He would not stay till his Death or trust to a *revocable* Security.

The Presumption of Fraud in this Case would be against Justice and Truth; and the public Inconvenience so great, that hardly a Will could stand.

This Charge ought to be in every Will.

The Persons attendant upon a dying Testator, and therefore most common Witnesses, are generally in *some Degree Creditors*; such as Servants, Parson, Attorney, Apothecary, &c: And the disallowing such Persons to be Witnesses can not answer Ends of public Utility.

Upon

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* Upon the Whole We are all of Opinion that this Will is *duly* * P. 431.
attested by three Witnesses.

JUDGMENT for the PLAINTIFF.

Rex *vers.* Strong.

MR. Clayton had moved (on the 19th Instant) That the Defendant might be at Liberty (without paying any Costs) *to pay into Court* 40 s. being the *Penalty* for his *exercising the Trade* of a Grocer, for the Space of one Month, contrary to 5 *Eliz. c. 4*; whereof he had been convicted upon an Indictment found at the last *Cumberland Assizes*; (which Proceedings the Defendant had removed hither by *Certiorari*;) And that thereupon the *Recognizance* might be *discharged*: And He founded his Motion upon the Authority of *Rex v. French, Pasch. 24 G. 2. B. R.* *Rex v. Fisher, Tr. 24 G. 2. B. R.* (Both, on the Motion of Mr. Ford;) in which Cases this was done; because by 5, 6 *W. & M. c. 11. §. 3.* No Costs are payable, *but* upon Indictments brought by the *Party grieved*, or upon Prosecutions by Justices, &c, or other civil Officers prosecuting *as such*. And so it was also, in a former Case, of *Rex v. Mary Incedon, M. 20 G. 2. B. R.* A Rule was made to shew Cause. And now, Mr. Norton not objecting to this Motion, (being satisfied with the Cases cited—)

The said RULE was made ABSOLUTE.

Jenkin *vers.* Whitehouse and Another.

MR. Madocks moved for a *Prohibition* to the Consistory Court of the Bishop of *Coventry and Litchfield*, to stay Proceedings in a Cause there, relating to the WILL of a MARRIED WOMAN, who was a Midwife by Profession, and had, by her Marriage-Settlement, a Power given Her *to make a Will* for the Disposition of her personal Gains in that Profession. He said this was *not a Will*, properly speaking: A *Feme-Covert* can *not* make a Will; And cited 1 *Mod. 211.* Anonymous, as in Point. Also in a Case of *Rex v. Dr. Bettefworth*, upon the Application of Miles Barnes Esq; against *Diana Robson*, Daughter of *Diana Elwick* formerly *Diana Robson* and late Wife of Governor *Elwick*, on 27th November 1751. *M. 25 G. 2. B. R.* this Court agreed “that the Spiritual Court “ could *not* treat it as a Will, by granting *Probate* of it;” though it is true, in that Case, the Court did not even make a Rule “to
“ shew

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* P. 432. * “ shew Cause why a Prohibition should not go ;” Because they thought the Spiritual Court had taken the right Method, *viz.* annexing the Paper or Instrument purporting to be Mrs *Elwick's* Will, to an Administration granted to her said Daughter Mrs. *Diana Robson*, upon the Renunciation of the Executors. And so 1 *Salk.* 313. *Shardelow v. Naylor* ; and *Farresley* 147. S. C. shews “ that “ this is not a Will, nor proveable by the Ordinary.”

And the Case of *Burnet v. Holgrave* in *Equity Cases Abr.* pa. 296. shews that this is not in it's own Nature *testamentary*.

And He said that the *Administration* granted to the Husband, had been brought *into the Spiritual Court, pendente lite* there : Which He prayed might be RE-DELIVERED to him ; and that this last Clause might be added to the Rule.

LORD MANSFIELD—That is going too far : We will not add *that*.

* 5th July
1744.
*See 4th case of Ross
v. Ewer in 3. Ash.
156.*

In a Cause of *Ross v. Ewer*, in Chancery, * there was a Power to a Feme Covert ; “ to appoint *by Will*.” Lord Chancellor held clearly, “ though such Will operates as an Appointment, it *must be proved* in the Spiritual Court :” And he would not proceed, *till* the Will was so *proved*. It was not material for him to consider of the *precise Form* in which it was to be *proved* ; whether by a *strict Probate*, or by granting Administration with the Appointment in Nature of a Will *annexed* : And therefore *that Point* was not entered into. But the *Fact*, “ that the Paper *was* her Will, in Case “ she had a Power to make one,” must be *established by the Ecclesiastical Court* : For such an Appointment is in the *Nature of Will*, and attended with all the *Consequences of a Will*.

† 26th Nov.
1750.

As to the Determination in the Case of *Burnet v. Holgrave*, “ that “ Money appointed, under the Execution of a Power, by such a “ Will should not lapse ;” It was very fully considered, and contradicted in the Cause of the Duke of *Marlborough* against the Earl of *Carlisle*, Earl *Godolphin*, and Others, in † Chancery.

The Cases cited or referred to by Mr. *Madocks*, shew that *Administration may be granted*, with the Appointment *annexed* : Which proves it to be *testamentary*. For nothing can be *annexed* to an Administration, but a *testamentary Disposition* : Which is proved and established by the Ecclesiastical Court in *that Form*.

But if the Question be, “ Whether the Wife *had a Power* to “ make an Appointment in the Nature of a Will, and thereby to “ deprive the Husband of any Benefit which by Law would devolve upon him in Consequence of her Death,” *That is a Question*

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*tion proper to be considered here: And if She had *no* such Power, * P. 433
this Court will grant a Prohibition. And *so far*, the Case in 1 Mod.
211, cited by Mr. Madocks, goes expressly.

It seems right, therefore, to grant a Rule “to shew Cause why
“ there should not be a Prohibition:” And then the Case will be
better understood, under all it's Circumstances.

The COURT granted a Rule to shew Cause :
But It never came on again.

Rex *vers.* Stephens.

Saturday,
26th Novem-
ber 1757.

MR. Coxe moved for an Information in Nature of a *Quo war-
ranto* against the Defendant *John Stephens Esq;* to shew by
what Authority He acted as one of the Aldermen of the Corporation
of *St. Ives* in *Cornwall*.

The Fact upon which the Information was prayed, was the
Defect of the Defendant's Title: Which stood as follows—

John Noall was elected Alderman in *June 1728*, WITHOUT being
then a Burgefs or Assistant; (which was a necessary previous Quali-
fication:) And the said *John Noall* was, the next Year, electe
Mayor. And all the succeeding Mayors and Aldermen were elec-
ted UNDER *Noall and his Successors* in the Mayoralty, (Each, under
his respective Predecessor;) and likewise by Aldermen claiming un-
der *Noall's* said defective Election; till in *September 1741*, the DE-
FENDANT was elected Alderman, BY such DEFECTIVE Electors as
aforesaid; and in *November 1742*, He was, by the like and no
better Authority, elected Mayor. And it was sworn that by the
Constitution of the said Burrough, there CAN be no DUE Election,
of a Mayor or Alderman, without a legal Mayor presiding at such
Election.

Note.—*Noall* died, a Year ago, in quiet Possession of his Office
of Alderman.

The COURT were clear and unanimous in REFUSING to grant
this Information; by reason of the STALENESS of the Defect of
Title, assigned as the Foundation for it; which was of no less than
29 Years standing. For they thought it would be of very ill Con-
sequence to Corporations, if the Court should, AFTER *so many*
Years Acquiescence, QUIETA movere, and call Corporators to ac-
count for acting under such Elections, depending upon the prior

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* P. 434. * Rights of Others, whose Rights had *never* been before objected to : Which must occasion infinite Confusion in Corporations.

And they said that though there was indeed no Statute nor even fixed Rule of Limitation, as to the Length of Time which should suffice to quiet the Possessors of these Offices, yet the Court, in their Discretion, ought to refuse granting these Motions, after a great Length of Time.

And LORD MANSFIELD observed that there was no direct and express Limitation of Time, when a *Bond* should be supposed to have been satisfied : The General Time indeed was commonly taken to be about 20 Years; but He had known Lord *Raymond* leave it to a Jury upon 18 Years.

Mr. Just. FOSTER mentioned a Case of *Malmesbury*, not so strong

* In a Case of as this Case : Where an Information was denied. *

Rex v. Mayor

of *Bridgwater*, M. 6 G. 1. B. R. An Information was refused, after 35 Years Acquiescence under the New Charter.

† But the

Leominster

Case (which

was *Rex v. Spencer*, 1st June 1741. Tr. 14, 15 G. 2. B. R. was not determined upon *this* Point ; (far from it, indeed :) but was refused for the Insufficiency of the *Affidavit*, and not properly proving the *By-Law* on which the Motion was grounded.

And Mr. Just. DENISON mentioned a like Case in † *Leominster* : In which He himself was Counsel. †

Per Cur. unanimously
The MOTION was DENIED.

Rex vers. Inhabitants of Lower Swell.

See this CASE *abridged*, in the TABLE ; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 140. pa. 436.

* P. 436.

Monday, 28
November
1757.

Cockerill, Assignee, *vers.* Owston.

THE Question was Whether a *Bankrupt's Certificate*, obtained after Judgment in an Action upon a *Bail-Bond*, against the BANKRUPT HIMSELF, (For the Bail were *not at all* concerned in this

Michaelmas Term 31 Geo. 2.

this Motion,) should *discharge the Bankrupt* FROM THIS *Judgment upon the BAIL-BOND*, as well as from the *Original Debt*: (Which the Plaintiff's Counsel agreed that it *did* discharge Him from.)

Note—The Defendant had paid the Money into the Sheriff's Hands, upon being taken up by a *Ca. Sa.* in Order to procure his Liberty. So that the Motion was "That the Money" might be restored to the Defendant, with Costs." And the Court had granted a Rule to shew Cause, upon Mr. *Luke Robinson's* Motion: Against which Rule, Mr. *Clayton* now shewed Cause.

The COURT held that the Certificate *obtained subsequent* to the bringing of this Action upon the Bail-Bond, (though such Certificate was founded upon an Act of Bankruptcy *prior* to the bringing this Action upon the Bail-Bond,) did NOT *discharge the Bail-Bond*; although it discharged the *Original Debt*: For that this was a *new and distinct Cause of Action*.

Indeed such Certificate shall discharge Proceedings depending *against Bail* in an Action upon the old Debt, *who are NOT already FIXED*: So it has been lately determined. *V. ante, pa. 244. Woolley v. Cobbe & al.* (Which is the Case they hinted at.)

RULE DISCHARGED: And Ordered that the Sheriff pay the Money to the PLAINTIFF.

The End of *Michaelmas* Term 1757. 31 Geo. 2.

Hilary

* P. 437.

* Hilary Term

31 Geo. 2. B. R. 1758.

Thursday, 26
January
1758.

Rose *vers.* Green:

THIS Case came before the Court upon a Reservation by Lord Mansfield at *Nisi prius* at Guildhall, for the Opinion of the Court "Whether the Defendant became a Bankrupt, on the 31st of *March*, or on the 6th of *May*:" Which particular Day was to be indorsed upon the *Postea*, agreeably to such Opinion.

This Mr. Green having been *arrested for Debt in Kent*, on the 31st of *March*, was afterwards on the 6th of *May* following, brought up by an *Habeas Corpus*, in order to be turned over; And, on the Road to the Judge's Chamber, was permitted (at the Desire of Himself and his Father,) to call at his Attorney's House (Mr. Penfold's) upon *Garlick Hill* in the City of *London*, which was *OUT of the COUNTY of Kent*; and was carried thence, (by a *Habeas Corpus*,) directly to a Judge's Chamber, to be bailed; and accordingly was bailed, but *INSTANTLY there surrendered* by his Bail, in Discharge of themselves, who had just before bailed Him: and thereupon *committed, EO INSTANTE, to the King's Bench Prison*, where he lay above two Months, *viz.* from the said 6th of *May* till the 15th of *July* next following.

Sir Richard Lloyd, Mr. Caldecott, and Mr. Bainham argued that this was an Act of Bankruptcy *from the Time* of the *first* Arrest, taking it either of these two ways; *viz.* either 1st, As a *LYING IN PRISON two Months* after having been arrested for Debt; (under 21 *J. 1. c. 19. § 2.*) Or 2dly, As an *ESCAPE* out of Prison, (under the same Clause) this Arrest being for above the Sum of 100 *l.*

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* 1st. If a Trader surrenders himself in *discharge* of his Bail, and * P. 438. *then* lies two Months, it is a Bankruptcy from the *first* Arrest. *Smith v. Stracy*, 2 Ann. 1 Salk. 110. at *Nisi prius* at Guildhall—Ld. Ch. J. Holt so inclined, and gave his Reason for it: Which Case was subsequent to the Case of *Came v. Coleman* in 1 Salk. 109. (where indeed the Court held otherwise.) *Tribe v. Webber*, P. 17 G. 2. C. B. was a Distance of more than *Nine Months* between the Putting in Bail, and the Surrender.

2dly. His being in *London* was an ESCAPE: And the Debt being above 100*l.* this *Escape* is an Act of Bankruptcy from the *first* Arrest.

Mr. Norton and Mr. Burrell, *contra*.—The Question upon the Case stated at the Trial, and reserved for the Opinion of the Court, is, “Whether He shall be a Bankrupt, from the 31st of March, “when he was *first* arrested; or from the 6th of May, when he “was *surrendered* and committed to the Marshal; (in whose Custody he lay from the 6th of May till the 15th of July.”)

As to the 2d Point—This was NOT a WILFUL Escape in the Prisoner: But he was *carried* out of the County by the Sheriff. And surely *this Act of a third Person* shall not make a Man a Bankrupt. Nor indeed can a *permissive* Escape suffered by the Sheriff, or any *Act of the Sheriff*, make a Man a Bankrupt; who is, in many respects, considered as a *Criminal*.

As to the 1st Point—When a Person is *once admitted to Bail*, his Lying in Prison *subsequent* thereto, *viz.* the *first Day of his* DOING so *after being surrendered*, shall be the Time to which his Bankruptcy shall relate: And *not* the Time of the first Arrest, upon which He put in Bail.

The Case of *Duncomb v. Walter* in 1 Ventr. 370. is ill reported there. So, in 3 Lev. 57. it is ill reported. It is also reported in Sir Tho. Raymond 479. and in *Skinner*, twice; *viz.* fo. 22 & 87, 88. In which last, it appears to be solemnly settled, “that the “Relation to make a Man a Bankrupt ought to be upon an *actual* “lying in Prison, and *not* upon putting in *Bail* only.” *

Came v. Coleman, 1 Salk. 109. is S. P. *viz.* “that the Bankruptcy “shall only be from the Time of *such* first Arrest, upon which He “lies in Prison: Not where he puts in sufficient *Bail*.” And in 17 G. 2. *Tribe v. Webber*, C. B. *per tot. Cur.* the same Point was resolved unanimously. The Case of *Smith v. Stracy* in 1 Salk. 110, 111. is only an Opinion of Ld. Ch. J. Holt, at *Nisi prius*.

*N. B. None of these Reports of this Case are well drawn up, except Sir Tho. Raymond's: And that is only an Argument, with an Adjournatur.

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* P. 439. * And it is admitted that the present Defendant was *at large*, at a Time intervening between the Arrest and the Surrender. But even allowing him to have *remained* in Custody of the Sheriff of *Kent*, Yet the two Months can only run from his first LYING in Prison. There must be *some* Time (more or less) between his being bailed, and his being committed to the Marshal. Therefore he was only a Bankrupt *from* the 6th of May.

Sir *Richard Lloyd* was beginning to Reply: But the Court thought it unnecessary.

LORD MANSFIELD observed that where positive Laws fixed and described what should be looked upon as Acts of Bankruptcy, they ought to be construed according to their *Intention*, and so as to *answer the Ends* of public Benefit, which the Legislature had in view.

2d Point.

In thus construing this Act of Parliament, He held this Case not to be such an *Escape* as that the Man should be thereby rendered a Bankrupt and a *Criminal*. For the Act clearly intended such an *Escape* made by a Prisoner, as shews that he means to RUN AWAY, and thereby defeat his Creditors. But this is *not* such an *Escape*: And certainly, a Man shall not be made a *Criminal*, where he had not the least Criminal Intention to disobey any Law whatsoever. There is *no Escape at all*, in the *Sense* of this Act of Parliament: He remained SUBSTANTIALLY in Custody, notwithstanding his being *thus carried* into another County.

1st Point.

Where Bail is *really* put in, the Bankruptcy *only relates* to the Time of the SURRENDER. The *most substantial* Trader is liable to be *arrested*; And the MERE being ARRESTED is *no* Presumption of Insolvency; The Presumption from his LYING in Prison two Months, WITHOUT *being able to get* Bail, is a *very strong* One. But THIS Sort of Bailing is a *mere* FORM, to turn the Defendant over from One Custody to another: The Bail *never justify*.

And upon Cases of superseding Actions by reason of the Plaintiff's not proceeding upon them within two Terms, being *merely turned over* from one Custody to another, is always considered as a *Continuance* of the same Imprisonment. And so I think it is, in the present Case, upon the *present Circumstances*; Notwithstanding what I have declared as my Opinion, upon the *general* Principle, and upon a *fair* and *substantial* Bailing. Therefore in the *present* Case, I think, the Bankruptcy has a Relation to the *first Arrest*.

2d Point.

Mr. Just. DENISON concurred, clearly, in both Points. Can it ever be called an *Escape* within the *Meaning* of this Act; when the Man

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* Man by *Permission* of the Sheriff *passes through* another County, in * P. 440. being carried to a Judge or to the Court? Can this be esteemed a *criminal Act* of the Man himself? Most certainly not.

Nor can this *formal Bail* put in *without Justification*, and ONLY in 1st Point. ORDER to be surrendered, (which is a mere *Matter of Form*;) be considered as being OUT of *Custody*, within the *Intent and Meaning* of this Act. No: It is a *Continuation of the same Imprisonment*; and has Relation to the *first Arrest and Imprisonment*.

Mr. Just. FOSTER was clear on both Points; and expressed Himself to the same Effect, as Lord MANSFIELD and Mr. Justice DENISON had done.

Mr. Just. WILMOT also most clearly concurred. And He laid it down, "That these *Bankruptcy-Acts* were to be construed according to their real *Intention*."

1st Point. The *general Principle* of the Cases cited is right: But the *Reason* of them is strongly *against* the present One, as it stands circumstanced. Here is *not a single Moment*, in which the Man is *out of Custody*: It is a mere Form of *changing his Prison*.

And the very * Act itself *distinguishes* between *Common Bail* (or * The Words no Bail at all,) and *sufficient Bail*. Now *this Bail*, in the present Case is, in Effect, NO *Bail* at all.

2^d Point. The Acts which render a Bankrupt a *Criminal*, must mean an Escape AGAINST the *Consent* of the Sheriff; a *running away*, and *breaking* his Prison: Certainly *not such* as this was, UNDER the *Consent* of the Sheriff.

Cur. ORDERED the *Poslea* to be indorsed, "That Green became a Bankrupt on the 31st of March."

Waring *vers.* Griffiths, et al'.

THIS was a Case reserved upon a Trial at *Nisi prius*.

The Plaintiff's Action was founded upon a prescriptive Right of Burial of any Person dying in his House at *Oswestree*, in the Chancel of the Church of *Oswestree*: In the Exercise of which the Defendants had disturbed him. And they themselves acknowledged that they had disturbed him in it.

The

Friday, 27th
January
1758.

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* P. 441. The Case stated was, in short, this: That the Plaintiff was seised of a Messuage &c, in *Oswestree* &c, and had such a prescriptive Right of Burial belonging to it; And that the Defendants *did disturb* him in burying &c. and *were Wrong-Doers*: But (it was also stated) that 2 s. WAS DUE to the Parish of *Oswestree*, for every Person buried in the Chancel of that Church.

Mr. *Aston*, on Behalf of the Plaintiff, argued that here were two Cross Prescriptions; and that the *two* Prescriptions were *distinct* and *collateral*; One, for the Plaintiff to bury &c; the other for the Parish to receive a Payment of 2 s. &c, for it: And therefore it was NOT *necessary to alledge* the latter, in the Declaration, it being only a *collateral* Recompence. And he cited *Cro. Eliz.* 546 & 563. *Lovelace v. Reynolds*, A Prescription for Common; And found that he had Common, *paying* for it &c. So that that was *part* of the Prescription; A *Condition precedent*: It was *paying for it*, every Year, a Penny to the Plaintiff. But it was holden to be otherwise, where there are *Two* Prescriptions; One, for the Commoner: the other, for the Lord: as in the Case in *Cro. Eliz.* 405. *Gray v. Fletcher*, Where the Prescription was found; And “that he and “all those &c, *had used* to pay for it, every Year a Hen and five “Eggs.” 5 Co. 78. S. C. *Gray's Case*—And there, the Terrentenant was adjudged to have a Remedy for the Recompence. And therefore this was holden to be *only Collateral*, and as *two* Prescriptions; and therefore need not be alledged, the Prescription being perfect without it. So here, it need not be alledged: But they may have their *Collateral Remedy*; as, in the *Ecclesiastical Court*, they may have. In proof whereof, he cited 1 *Ventr.* 374. *Anonymous*. Where it is said “That the Remedy for a Duty of this kind “is in the Ecclesiastical Court.”

And this Fee is not to be paid *till after* the Burial: And therefore the Non-payment of it cannot defend the Wrong-Doer, who is a *Stranger*. So, in an Action against a *Stranger*, for disturbing his Seat, or Sepulture in a Church, it is *not necessary* to shew any *Title in the Plaintiff*. 3 *Lev.* 73. *Ashby v. Freckleton*: Though in such an Action against the *Ordinary* himself, it is *necessary* to shew some Cause; as building, repairing, &c.

Kenrick v. Taylor, *Pasch.* 25 G. 2. B. R. It was solemnly determined “That in the Case of a Stranger and Wrong-Doer, it was “*not necessary* to alledge more than his own Right and a Disturbance.”

He mentioned the two following Cases, *viz.* 2 *Lutw.* 1517. *Bennington v. Taylor*; and 3 *Lev.* 90. *Chafin v. Betsworth*, Which (as

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* (as he said) are like this Case. They were Disturbances, by * P. 442. Strangers, in erecting Stalls in a Market-Place: And no Title is shewn. So, in Case of a free Fishery.

And the Finding is quite immaterial. For this collateral Claim is no Part of the Plaintiff's prescriptive Right. *Palmer* 82. * the * 4th Point. Case of the Corporation of *Maidenhead*, in a Claim of a Market &c. *Mayor of Northampton v. Ward*. Mich. 19 G. 2. B. R.

Mr. *Hall contra* for the Defendant argued that it was PART of the Prescription; and that it ought to have been alledged, even against a WRONG-Doer, "that this 2 s. was payable to the Parish, for " every Person so buried." This is a Prescription upon a Condition precedent. It is an entire Prescription: The Payment of the 2 s. is Parcel of the Prescription; and it ought to have been so laid and alledged. Prescriptions are against Common Right; and ought to be proved, as laid: And the Plaintiff must prove it as laid; even against a Wrong-Doer. And if the Evidence fall short of the Prescription pleaded, it will be against the Person who pleaded it. In proof of which Position, He cited these Cases—*Cartbaw* 241. *Rex v. the Inhabitants of Hermitage et al.* The Prescription was not proved as laid, because there was an Exception. *Palm.* 326. *Countess de Devon v. Eyre*. Which was a Prescription *pro Ovibus generally*; (instead of *Ovibus suis*;) The Proof failed. *Hobart* 209. *Michell v. Mortimer*. The Prescription failed; because it was laid too large. *Cro. Eliz.* 415. *Boraston v. Hay*: A Custom pleaded generally; but found with an Exception: It is against the Pleader. *Cartbaw*, 117. *Murgatroid v. Law*. The Case of *Potwater* mentioned by *Popham* in *Gray's Case* 5 Co. 78. b. and *Cro. Eliz.* 405. laid generally; found "paying 6 d. by the Year" was ill laid. *Lovelace v. Reynolds Cro. Eliz.* 546, 563, allows *Gray's Case*, and the Case of *Potwater*. 2 Ro. Abr. 720. *Title Trial*, pl. 30, in Prohibition—The Plaintiff declared upon a Prescription about Lambs; And the Jury found farther, &c.: It was holden that the Plaintiff ought to have rehearsed the whole of it; and that for not doing so, he had failed in his Prescription.

Now here, the Payment of 2 s. is PART of the Prescription and must be as ancient as the Right; which is "to bury in the Chan-
" cel, any Person dying in his House; * paying 2 s. for each Per-
" son." Which is a Condition PRECEDENT, and therefore ought
to have been alledged. *Forrester*, 166. *Sir John Robinson v. Co-*
myns, "There are no technical Words to distinguish Conditions pre-
" cedent, and Conditions subsequent." *Acherley v. Vernon—per Ld.*
Ch. J. Willes. [See this Case in *Lucas* 518.] *Watson* 709.

* Note. He does not here state the present Prescription truly, according to the Case stated. V. ante 441.

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* P. 443. * The Church-Wardens had no Remedy, but by Interruption, And being stated as *a Fee for Burial*, it ought to be paid *before Burial*.

The COURT will not direct a Person to be turned over on *Ha. Cor.* till the Gaoler's Fees be paid. 2 *Hawk. P. C.* 151. §. 31. is so. So, in Cases of the Fee of *Gloves*, on pleading Pardons. 1 *Siderfin* 452. *Rex v. Webster*, "The Pardon is *not* to be *allowed*, till the "Fees be paid, *viz.* the *Gloves* to the Court and Officers." Sir T. Jones 56. B. G. presented *Gloves* to all the Judges, according to Custom. *Kely.* 25. *Gloves* are a *Fee due*, on pleading a Pardon.

—*We are not* the Church-Wardens, I agree; but *Wrong-Doers*. (And then he disclosed their Provocation: Which, He, said was in Defence of the Bones of one Mr. *Griffiths*, a former Possessor of this Messuage; which Mr. *Waring* was turning out, in Order to make room for a *Servant* of his own.) But the Plaintiff had *no Right to the Soil*: And therefore he ought to have *set out* his Title. And here, he ought to have *proved* his Case, *As he has laid it.* 3 *Mod.* 48. 52. *Hebblethwaite v. Palmes*; per Ch. Justice, (at the End of the Case,) "The Plaintiff ought to *prove* "his Prescription: Or else, he must be *Nonfuit*." And the *same* Prescription ought to be given in *Evidence*, as is *laid*.

Gray's Case is *best* reported by Lord Coke, in 5 *Co.* 78. b. 79. a. And that Case turns upon the Remedy, which the *Terre-tenant* has for the Recompence. And according to the Case of *Potwater* there mentioned, (paying 6 *d.* yearly,) here could have been no *Remedy* for the 2 *s.* Fee, but by a *subsequent* Disturbance upon a *future* Burial.

Mr. *Aston's* Cases are not applicable to the present Case; because in them there was a *collateral* Remedy: But here We have none. Therefore the Plaintiff ought to be in the present Case nonsuited; and We are intitled to the *Postea*.

Mr. *Aston* was going to reply: But

The COURT prevented him; being extremely clear for the Plaintiff: And LORD MANSFIELD said—that the DISTINCTION is between the Case of the OWNER *of the Soil*, and the Case of a STRANGER, disturbing the Person who has a Right of this Sort.

Where a Person claims a Servitude upon another's Property, he *must lay* and prove *the WHOLE*, against the OWNER of such Property. There is a great Difference too between granting a Servitude,

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* tude, *absolutely*; and granting it, *sub modo*: The latter is a Condition precedent. And there are many Reasons why in Case of a Condition precedent, where the Grantee brings his Action against the Owner, the *whole* ought to be *set out*: (which Reasons He specified.) * P. 444.

But in an Action against a *Stranger* and *Wrong-Doer*, it is *not* necessary to *set out* the *whole*. Here, (which is agreed to be in the Case of a *WRONG-DOER*;) the Plaintiff has *stated enough*, and has *proved* it. He claims a Right to bury in the Chancel; and is disturbed by a *Stranger* and a *Wrong-Doer*. What is the Defence? "That if *he had* buried the Corpse in the Chancel; (which the Defendants hindered him from doing,) the *Church-Wardens* *would have had* a Right to 2 s. for a Burial-Fee." But he was *disturbed*, by the Defendants, *from burying the Corpse there*: And *then* the Church-Wardens had *no* Right to the 2 s. For their Right arose the upon Corpse *being buried there*.

For this Purpose, the Payment of the 2 s. is *no material* and *essential* Part of the Prescription; but *collateral* to it. It is *not* an entire Prescription, as in the Case of *Lovelace v. Reynolds*; whereof the Payment of the Penny was *Parcel*.

Mr. Just. DENISON concurred entirely. And He distinguished this Case (as *Ld. Mansfield* had also done) from that of *Lovelace* and *Reynolds*: which was "*paying for it, every Year a Penny.*"

But whatever may be the Right that the *Church-Wardens* might in the present Case have, the Plaintiff had *no* Need to *set out* this Right, in an Action against a *Wrong-Doer*, a *Stranger*. I do not know that in *this* Case, he needed even to have set out any Prescription, in this Action against a *Stranger* and *Wrong-Doer*. And this Matter seems settled in the Case of *Kendrick v. Taylor*.

Mr. Just. FOSTER concurred for the same general Reasons. And He thought the Payment of the 2 s. to be rather a *Customary Payment*, than a Prescription: being "*for EVERY Person buried in the Isle, or Chancel.*" To which, *Ld. Mansfield* agreed.

Mr. Just. WILMOT was also clear in the general Position laid down by the rest, as before. And he observed also, "that the *Duty could never arise till AFTER the Sepulture.*" And therefore He thought that if the Action had *even* been brought *against* the Church-Wardens, it had yet been within the Distinction of *Gray's Case*, and to be come at by a *collateral Remedy*; and *not Parcel* of the Prescription, or a Qualification of it. But against a *Wrong-*

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* P. 445. * *Wrong-Doer*, POSSESSION *alone* is certainly sufficient. Therefore He was clear, upon both Points.

Per Cur. unanimously
Let the POSTEA be delivered to the PLAINTIFF.

Rex *vers.* Loxdale and FOUR Others.

MR. Morton had sometime ago, (*viz.* on Monday 17th November 1755.) moved to quash an Order of two Justices appointing FIVE Overseers for the Parish of St. Chad. in Shrewsbury.

His Objection was that the Justices have no Power to *exceed* the Number of FOUR. Which Objection was founded upon the Words of 43 *Eliz. c. 2. §. 1.* “ That the Church-Wardens of every Parish; “ and FOUR, *three*, or *two* substantial Householdors there, as shall “ be thought meet, having respect to the Proportion and Great- “ nefs of the same Parish and Parishes, to be nominated yearly in “ *Easter* Week or within one Month after *Easter*, under the Hand “ and Seal of two or more Justices of the Peace in the same Coun- “ ty, (whereof one to be of the *Quorum*) dwelling in or near the “ same Parish or Division where the same Parish doth lie, shall be “ called Overseers of the Poor of the same Parish: And they, or “ *the greater Part of them, &c.*” And he mentioned a former Case of *Rex v. Harman*, upon the very same Point, which depended in this Court from *P. 12 G. 2.* to *M. 15 G. 2.* and at last was never determined; and also *Rex v. Besland, Hil. 19 G. 2. B. R.* which was the *Reverse* of an EXCESS of their Jurisdiction, where the Order, (being to appoint ONE Overseer,) was confirmed.

A Rule was thereupon made, “ to shew Cause.” And after the Point had been several Times argued in *Ld. Ch. J. Ryder’s* Time, it came on to be argued once more, on the 27th of *January* 1757, before Lord *Mansfield*, He having never heard the former Arguments. When the same Things which had been so often said, were again repeated.

On the Side of the Extension of the Number of Overseers, *Usage* was alledged and greatly relied upon.

Note—The Court, misled by Assertions “ that there had been “ a Usage to appoint more Overseers than four;” for fear of Inconvenience, had avoided determining the Question in the Case of the *King v. Harman*, after it had depended six Years, in hopes that the Legislature would make some Provision for what was past, as well as for the Future. And upon the
same

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* same Apprehension, the Court had hitherto postponed the * P. 446.
Determination of this.

LORD MANSFIELD said He had seen full Notes of the former Arguments of the present Case; and also of the Case of *Rex v. Harman*. He observed particularly what was said as to the Usage in large Parishes. And He therefore had directed Inquiry to be made in many large Parishes, as to the Fact “Whether there had been such Usage, or not.” And he ordered the Return which had been made to Him upon such Inquiry, by the Agents on both Sides, to be read. From which, it appeared thus—In St. *James’s Clerkenwell*, 4. In St. *Bridgett’s*, 3. In St. *Dunstan’s*, 2. In St. *Clement’s Danes*, 4. In St. *Paul’s Covent-Garden*, 2. In St. *George’s Hanover Square*, 4. In St. *James’s Westminster*, 4. In St. *Margaret’s Westminster*, 2. In St. *Andrew Holbourn*, 8: (but that Parish contains 3 separate Divisions.) In St. *Giles’s in the Fields*, 8; (though now only 4 are appointed by the Justices, and act as Assistants, unless 8 voluntarily serve: but there were never less than 8 before the Case of *Rex v. Harman*.) In St. *Martin’s in the Fields*, 5. (since the Act of Parliament lately made, which impowers them to appoint 9, if in the Discretion of the Justices it should be thought proper.) In *Shrewsbury*, (which contains 5 Parishes; In St. *Alsemonds*, 3. In *Holy-Cross* and St. *Giles’s*, 4. In St. *Mary’s*, 4. St. *Julian’s*, 4. St. *Chad’s*, 5, for one Year only; And never exceeding 4. but once, viz. this present Year.

After reading the Report, Lord Mansfield proceeded,—The USAGE is, as it were, out of the Case; or rather, it supposes “that they can not legally exceed 4.”

Therefore, consequently, but little INCONVENIENCE can arise from determining the Construction of the Statute, according to its natural Import.

As to legal Constructions—The Case of *Rex v. Harman* was never determined * as to the * Order for the APPOINTMENT of Overseers.

In the Case of *Rex v. Besland*, where only One Overseer was appointed, no Opinion was given judicially, upon the Point of Law; nor was the Appointment † quashed. So that the present Case is a NEW ORIGINAL Case: And it must be determined upon the 43 *Etiz. c. 2*; which is the Foundation of the System of Law concerning the Poor.

There was another Order, adjudging *Harman* “to have neglected the Execution of his Office;” which was quashed in *Mich. 13 G. 2.*

† It was confirmed, as not necessarily appearing to be a bad Order: For it might be, “that others were appointed by other Orders.”

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* P. 447. * There is a known Distinction between Circumstances which are of the *Essence* of a Thing required to be done by an Act of Parliament, and Clauses *merely directory*. The *precise Time*, in many Cases, is NOT of the *Essence*.

In the Case of *Rex v. Sparrow*, 2 *Strange* 1123, the Justices had been guilty of a *Neglect*, in not appointing Overseers within *due Time*: And this Court issued a *Mandamus* to compel them to do it afterwards, for the *Sake of the Poor*. The Poor could not have had a *SPECIFIC Remedy*, in that Case; *unless* the Justices might do it *after* the precise Time, in Obedience to the *Mandamus*.

So, as to the Justices “*in or near* the Parish or Division” It is *only Directory*.

Justices of Peace have *no other* Power to appoint Overseers but under the Special Authority given them by Act of Parliament. Therefore this Special Authority must be strictly pursued, and can *not* be *exceeded* by them. The Question here is upon the Meaning and Intention of the Legislature, in this Power given the Justices to appoint Overseers.

Where there are different Statutes *in pari materia*, though made at different Times, or even expired, and not referring to each other they shall be taken and *construed together*, as one System, and as explanatory of each other. So, in the Laws concerning Church Leases; and those concerning Bankrupts. And so also I consider All the Statutes providing for the Poor, as *one System* relative to that Subject. Now 39 *Eliz. c. 3*, is the first of these, and when first mentioned by my Brother *Foster*, struck Me strongly, with regard to the Determination of the present Question. That Act says, “That the “Church-Wardens and FOUR substantial Householders, &c,” (*without any Latitude* whatsoever, for a greater Number.) And *more* than four could *not* have been appointed under it: For the Number the *Legislature* had named, could *not* be altered.

That Act of Parliament of the 39 *Eliz.* was *continued* by the very Act of 43 *Eliz. c. 2. §. 18*, till the following *Easter*, when that of 43 *Eliz. c. 2*, was to take Place: So that the Legislature had it before them, and even under *particular* Consideration. And that Act of 39 *Eliz.* is expressly fixed to *four*. Parishes were not then, so populous as they are now. And this Act of 43 *Eliz. c. 2*. gives Power to *lessen* the Number to Three or Two according to the Size of the Parish: But they had no Notion of *extending* it to a *greater* Number. And there is *some* Weight in the Circumstance of the Numbers *descending* from 4 downwards, and *not ascending* upwards.

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* As to the Argument which was drawn from 13, 14 C. 2. c. 12. * P. 448.

§. 21. I think that Statute *ought* to be taken into the Consideration in construing this of 43 Eliz. c. 2: But I do *not* see that this will help the Case. For it is begging the Question, to suppose “ that the Justices MAY appoint *more* than 4 Overseers of the Poor, in “ Townships and Villages in those large Parishes.” It is expressly directed by that Statute of 13, 14 C. 2. c. 12. §. 21. that such Choice and Appointment shall be, (And the Construction of it must be guided according to its *own* Reference,) “ ACCORDING to the “ Rules and Directions mentioned in the Statute of 43 Eliz.” And neither any judicial Determination, nor Usage, support this Conceit “ that they *can* appoint *more* than 4 in these Townships and Villages in the large Parishes.”

That Act of 13, 14 C. 2. was indeed rightly and reasonably extended to *Wales*. But no Argument can be drawn from *that* Latitude of Construction: As both the Words of it, (which *name Wales*,) and also the general Intention of it, (*viz.* the *Care of the Poor*,) well justified *such* an Extension.

Then the Act of Parliament in 1740, relating to St. *Martin's* and the Overseers of that Parish, and which extends their Number, shews the Construction put *by the Legislature* themselves upon the 43 Eliz. on this Head; and excepts this very large Parish of St. *Martin* out of it. And yet even this very Act *restrains* the Number to *Nine*: Which shews that the Justices had no Power under the 43 Eliz. to appoint *what Number* THEY PLEASED. For it would be a strange Thing, to *limit* the Number, in a *very large* Parish; and leave it *at large*, in *smaller* Ones.

There are two other Acts of Parliament, which have not been mentioned; and both of them passed after the Case of *Rex v. Harman*, and after the Case of St. *Clement Danes*; *viz.* 17 G. 2. c. 3, and 17 G. 2. c. 38, both relating to Overseers: And yet no Extension of Number, nor any Variation therein.

The PRECISE NUMBER is *not* an *immaterial* Thing; either to the Officers of the Parish, or to the Persons for whom they are Trustees. Upon themselves, 'tis a Burden: Which, by this Practice, would come round the sooner. And in respect to the Parish for whom they are Trustees, a great Number may not do Business better than a smaller; and it would be attended with more Expence.

Also with regard to the *Church-Wardens* who are joined in Authority with them—They are *only* 2, or (by Custom) 4 Church-Wardens in each Parish. Therefore a greater Number of *Overseers* being

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* P. 449. * being appointed, necessarily alters the Balance of the *Majority* amongst them, and makes an essential Difference in the Proportion between one and the other. And there is no Number to *stop* at, if the Justices *exceed* four: They may go on, without *any* Boundary, unless the specified Number of Four be the Limit.

Therefore I think this Appointment of *more* than 4, is NOT warranted by the 43 *Eliz.* upon the *true* Construction of that Statute.

Mr. Just. DENISON concurred in Opinion, "that this Appointment ought to be quashed:" And He did not think that this Court *ever had had* any Doubt about the *legal* Determination of this Question.

He then stated and expatiated upon the Case of *Rex v. Harman*; and said the Reason why the Court did not quash that Appointment was *merely* for the *Sake* of the *Poor*; and not from any Doubt of the *Law*.

Bessland's Case was quite a different Case from that of appointing a *greater* Number than four. The Point of the Validity of an Order appointing more than Four, is a *new* Case; but *not* a *difficult* One, at all.

This Act of 43 *Eliz.* is, as one may call it, the *Magna Charta* of the Poor. And it can never be called *directory* as to the *Number of the Overseers* appointed by it.

By 1 *Inst.* 13. *b.* it appears that there were *only two Escheators*, in *England*, in ancient Time: Though more were made indeed by Act of Parliament, [14 *E.* 3. *c.* 8.] So there can be but *One Chief Justice*, or *Chief* Protonotary. *Jenkins* 142. *Case* 93. So, in the Constitution of the Court of *Wards*; where 32 *H.* 8. *c.* 46. enacts "that there shall be *two* Auditors of the Court of *Wards*," the King can not make *Four*. So is 11 *Co.* 4. *a.* *Auditor Curle's* Case.

Certainly, the Legislature had the Number which stood fixed by 39 *Eliz.* in their *View* and under their *Consideration*, when they made the 43 *Eliz.* And Can it be imagined that the Justices have a Jurisdiction to appoint *more*? Clearly, they have *not*.

In the Case of *Rex v. Sparrow*, (mentioned in 2 *Strange* 1123.) The Court took great Care in their Determination. And 13, 14 *C.* 2. was there considered by Ld. Ch. Just. *Lee*, as tied up to the Rules and Directions of 43 *Eliz.* And that *Mandamus* was issued for the *Sake* of the *Poor*: And the Court equitably and rightly held "That when the Justices had elapsed the Time for appointing
" Overseers,

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* Overseers, the Court might oblige them to do it afterwards, as * P. 450.
“ to the *Time*; THAT being discretionary.”

But No-Body ever thought it discretionary *as* to the NUMBER :
And there is no Reason in the Earth, for Us to break the Boundary,
which is fixed. Therefore He was clear, to quash the present
Order for the Appointment of *five*.

Mr. Just. FOSTER declared the very same Thing; and that He
never had any Doubt in Point of *Law*: His only Doubt was in
Point of *Discretion*; as He *then* supposed the *Usage* to be otherwise
than as it *now* appeared to be.

When the Statute of 43 *Eliz.* was made, there were very few
large Parishes in Towns and Cities: Therefore at *that Time*, the
Parliament thought Four Overseers sufficient. Under 39 *Eliz.* I
take it, the Justices *could not have gone BELOW Four*. For, It be-
ing a *Special Power* given by Statute, must be *strictly pursued*. And
therefore, in the 43 *Eliz.* the Legislature, though they took the Act
of the 39th for their Plan, and followed it in almost every Instance;
Yet, seeing the Inconvenience in small Parishes, departed from it
with regard to the NUMBER of Overseers: Which they *reduced*, at
the Discretion of the Justices; but did *not increase*, in any Event;
Probably because they thought *Four* Overseers, *with* the Church-
wardens, sufficient for the largest Parish (as they certainly are,) *though*
too many for the small Ones.

If it be *now* become inconvenient, the Application must be to
Parliament. However, He declared that He did not think that
Business is best done by a Multitude of Hands: And in Fact, where
the Number that are to do it is large, they always delegate the ac-
tual Transaction of it to a *Few*.

It is NOT true, (what some People imagine) “ That the *Common*
“ Law of England made no Provision for the Poor:” The Mirror
shews the *contrary*. How, indeed, it was *done*, does not appear.

As to the Case of *Rex v. Sparrow*,—43 *Eliz.* fixes a *Time* to ap-
point Overseers, with a Penalty: But did not mean that the *Poor*
should loose the Equity and Benefit of the Act, if the Justices did not
appoint *within* that Time.

No Parish ever applied for a *Mandamus* commanding the Justices
to appoint *more* than Four. The general Sense of Mankind was
against it. This is an *Authority founded* upon a *positive* Law; and
therefore must be pursued.

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* P. 451. *Mr. Just. WILMOT declared (as his Brethren Mr. Just. DENISON and Mr. Just. FOSTER had done) that He never had had the least Doubt, but upon the Apprehension of an *Usage* of the large Parishes, for many Years back, *to appoint* MORE than Four. But this Apprehension is now vanished: And therefore the *Usage* (as it *now* comes out) confirms the *true* Construction of the Act.

The Instances of greater Numbers appear to be *only Three*: And One of them (*St. Andrew's Holbourn,*) is considered as 3 Vills, under 13, 14 C. 2. And *St. Martin's* (another of them) is under a new Act of Parliament made on Purpose. I think this Order *cannot* be supported.

There *were* Provisions for the Poor, as my Brother FOSTER has observed, at *Common Law*: Though it does not fully appear *what* they were. The first *regular* Provision however, is by 39 *Eliz.* By this Statute, and by 43 *Eliz.* the Legislature add *Four* OVERSEERS to the *former parochial Administration*. And no One can doubt that the *Number* is *essential*; and *cannot*, by the Rule of Law be *exceeded*. For Powers given by a positive Law, or even by Deed, to *CERTAIN Numbers* of Persons can never be exceeded, in the Article of Number. On the other hand, If it had rested singly upon 39 *Eliz.* the Number 4 could not have been *lessened*. But then indeed the 43 *Eliz.* relaxes this precise Number of *Four*, as to *small* Parishes; but still *continues it*, as to all *greater*. And where the Makers of the Act *intend* an *indefinite* Number, they EXPRESSLY *say so*. For the 19th Section relating to the Island of *Foulness* converts the whole District into one Parish, for this Purpose; and *directs* an *indefinite* Number of Overseers for *that* Place. Which Clause *alone* would satisfy me, as to the *Sense* of the *Legislature*. And they might as easily have said “*So many* as should seem necessary,” as precisely fix it to *Four*; if they had meant it so.

And it is (as has been observed) an Office which is burdensome upon the Persons appointed: And Business is *not* better done by great Numbers of Men, than by a few. And the *Parish* have as great Security from Four, as from more. Upon the whole, He entirely concurred, “That the Order could not be supported.

Mr. *Norton* moved that the Order might not be immediately quashed; because the Overseers had laid out 500 *l.* or 600 *l.* under it: And therefore He proposed that the Other Side should consent to have one of the Overseers *left out* of the Order.

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*The COURT thought it might be reasonable; And for this * P. 452.
Reason ONLY, did not directly and immediately pronounce the Rule
“To quash the Order.”

But now, at a Day so long subsequent, on Mr. *Morton's* Motion for the Judgment of the Court; and Mr. *Norton*, not urging any thing further against it, (and acknowledging that He had spoken to his Client,)

LORD MANSFIELD said there must be an End of it, some Time or other: Therefore let the RULE be made absolute, to

QUASH the APPOINTMENT.
ORDER QUASHED.

Miller *vers.* Race.

Tuesday, 31st
January
1758.

IT was an ACTION of TROVER against the Defendant, upon a BANK-NOTE, for the Payment of Twenty-one Pounds Ten Shillings to One *William Finney* or Bearer, on Demand.

The Cause came on to be tried before Lord *Mansfield*, at the Sittings in *Trinity* Term last at *Guildhall, London*: And upon the Trial it appeared That *William Finney*, being possessed of this Bank-Note on the 11th of *December* 1756, sent it by the General Post, under Cover, directed to One *Bernard Odenbarty* at *Chipping Norton* in *Oxfordshire*; That on the same Night, the Mail was robbed, and the Bank-Note in Question (amongst other Notes) taken and carried away by the Robber; That this Bank-Note, on the 12th of the same *December*, came into the Hands and Possession of the Plaintiff, for a full and valuable Consideration, and in the usual Course and Way of his Business, and without any Notice or Knowledge of this Bank-Note being taken out of the Mail.

It was admitted and agreed, that in the common and known Course of Trade, Bank-Notes are paid by and received of the Holder or Possessor of them, as Cash; And that in the usual way of negotiating Bank-Notes, they pass from one Person to another as Cash, by Delivery only, and without any further Inquiry or Evidence of Title, than what arises from the Possession. It appeared that Mr. *Finney*, having Notice of this Robbery, on the 13th of *December*, applied to the Bank of *England*, “to stop the Payment of this Note:” Which was Ordered accordingly, upon Mr. *Finney's* entering into proper Security “to indemnify the Bank.”

Some

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* P. 453. * Some little Time after this, the Plaintiff applied to the Bank for the Payment of this Note; and, for *that* Purpose, delivered the Note to the Defendant, who is a Clerk in the Bank: But the Defendant refused either to pay the Note, or to *redeliver* it to the Plaintiff. Upon which, this Action was brought against the Defendant.

The Jury found a Verdict for the Plaintiff, and the Sum of 21 l. 10 s. Damages; subject nevertheless to the Opinion of this Court upon this Question—"Whether, under the Circumstances of this Case, the Plaintiff had a *sufficient Property* in this Bank-Note to intitle him to recover in the *present Action*?"

Mr. *Williams* was Beginning on Behalf of the Plaintiff.—

But LORD MANSFIELD said "That as the Objection came from the Side of the Defendant, it was rather more proper for the Defendant's Counsel to state and urge their Objection.

Sir *Richard Lloyd*, for the Defendant.

The present Action is brought, *not* for the Money due upon the Note; but for the NOTE *itself*, the Paper, the Evidence of the Debt. So that the Right to the MONEY is *not* the present Question: The Note is only an Evidence of the Money's being due to him AS BEARER.

The Note must either come to the Plaintiff *by Assignment*; or must be considered as if the Bank gave a *fresh, separate, and distinct Note to each* Bearer. Now the Plaintiff can have no Right by the *Assignment of a ROBBER*. And the Bank cannot be considered as giving a *new* Note to each Bearer: Though each Bearer may be considered as having obtained from the Bank a *new PROMISE*.

I do not say Whether the Bank *can*, or *cannot stop Payment*: That is *another* Question. But the Note is only an *Instrument* of Recovery.

Now this Note, or these Goods (as I may call it,) was the *Property* of Mr. *Finney*, who paid in the Money: *He* is the real Owner. It is like a Medal, which might intitle a Man to Payment of Money, or to any other Advantage. And it is by Mr. *Finney's* Authority and Request, that Mr. *Race* detained it.

It may be objected, "that this Note is to be considered *as Cash* in the *usual Course of Trade*." But still, the Course of Trade is

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* not at all affected by the *present* Question, about the Right to the * P. 454.
Note. A *different Species of Action* must be brought for the *Note*,
 from what must be brought against the Bank for the *Money*. And
 this Man has elected to bring *Trover* for the *NOTE* itself, as *Owner*
 of the *NOTE*; and not to bring his *Action* against the Bank, for
 the *Money*. In which *Action of Trover*, *Property* can not be proved
 in the Plaintiff: For a *Special Proprietor* can have no *Right* against
 the *TRUE Owner*.

The Cases that may affect the present, are 1 *Salk*. 126. *M. 10*
W. 3. Anonymus, coram Holt, Ch. J. at Nisi prius at Guildball,
 There *Ld. Ch. J. Holt* held "that the right Owner of a Bank-Bill,
 " who lost it, might have *Trover* against a Stranger who found it:
 " But not against the Person to whom the Finder transferred it for
 " a valuable consideration, by reason of the *Course of Trade* which
 " creates a *Property* in the Assignee or Bearer." 1 *Ld. Raym.* 738.

* S. C. In which Case, the Note was paid away, in the Course of * N. B. In
 Trade: But this remains in the Man's Hands, and is not † come this Case, the
 into the Course of Trade. *H. 12 W. 3. B. R. 1 Salk.* 283, 284. Transferree
Ford v. Hopkins per Holt Ch. J. at Nisi prius at Guildball. " If went to the
 " Bank-Notes, Exchequer-Notes, or Million-Lottery Tickets, or Bank; and
 " the like, are stolen or lost, the Owner has such an Interest or got a new Bill,
 " Property in them, as to bring an Action, into WHATSOEVER in his own
 " Hands they are come. Money or Cash is not to be distinguished: Name. How-
 " But these Notes or Bills are distinguishable, and can NOT be ever, the Case
 " reckoned as CASH; And they have distinct Marks and Numbers turned upon
 " on them." Therefore the true Owner may seize these Notes his having the
 wherever he finds them, if not passed away, in the Course of Trade. Note for a
 † The Fact seems to be quite other-
 wise.

1 *Strange* 505. *H. 8 G. 1. In Middlesex, coram Pratt Ch. J.*
Armory v. Delamirie—A Chimney-Sweeper's Boy found a Jewel.
 It was ruled "that the Finder has such a Property as will enable
 " him to keep it against ALL but the rightful Owner, and, con-
 " sequently, may maintain *Trover*."

This Note is just like any other Piece of Property, UNTIL passed
 away in the Course of Trade. And here the Defendant acted as
 AGENT to the TRUE Owner.

Mr. *Williams contra* for the Plaintiff.

The HOLDER of this Bank-Note, upon a valuable Consideration,
 has a Right to it, even against the true Owner.

1st. The Circulation of these Notes vests a Property in the Holder,
 who comes to the Possession of it, upon a valuable Consideration.

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* P. 455. * 2dly. This is of vast *Consequence to Trade and Commerce*: And they would be greatly incommoded, if it were otherwise.

3dly. This falls *within the Reason* of a Sale in *Market-Overt*; and ought to be determined upon the *same Principle*.

First—He put several Cafes, where the Usage, Course, and Convenience of Trade, *made the Law*: And sometimes, even *against an Act of Parliament*. 3 *Keb.* 444. *Stanley v. Ayles*. *Per Hale* Ch. J. at *Guildhall*. 2 *Strange* 1000. *Lumley v. Palmer*: Where a Parol-Acceptance of a Bill of Exchange was holden sufficient against the Acceptor. 1 *Salk.* 23.

Secondly.—This Paper Credit has been always, and with great Reason, favoured and encouraged. 2 *Strange* 946. *Jenys v. Fowler et al'*.

The Usage of these Notes is, “that they *pass by Delivery only*; “and are *considered as current Cash*; and the POSSESSION always carries with it the Property.” 1 *Salk.* 126. *pl.* 5. is in Point.

A particular Mischief is rather to be permitted, than a general Inconvenience incurred. And Mr. *Finney* who was robbed of this Note, was guilty of *some Laches* in not preventing it.

Upon Sir *Richard Lloyd's* Argument, a Holder of a Note might suffer the Loss of it, for want of Title against a true Owner; even if there was a Chasm in the Transfer of it through one only out of 500 Hands.

Thirdly—This is to be considered upon the *same Foot* as a Sale in *Market Overt*.

2 *Inst.* 713. “A Sale in *Market Overt* binds those that had Right.”

But it is objected by Sir *Richard*, “that there is a substantial “*Difference* between a Right to the Note, and a Right to the Money.” But I say the Right to the Money will *attract* to it a Right to the Paper. Our Right is not by *Assignment*; but by *Law*, by the Usage and Custom of Trade. I do not contend that the Robber, or even the Finder of a Note, has a *Right to the Note*: But AFTER *Circulation*, the Holder upon a valuable Consideration has a Right.

We have a *Property* in this Note: And have recovered the Value against the WITH-HOLDER of it. It is not material, *what Action* We could have brought against the Bank.

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* Then He answered Sir *Richard Lloyd's* Cases; And agreed that * P. 456.
the true Owner might pursue his Property, where it came into the
Hands of another, WITHOUT a *valuable Consideration*, or NOT IN
the Course of Trade: Which is all that *Ld. Ch. J. Holt* said in
1 *Salk.* 284.

As to 1 *Strange* 505. He agreed that the Finder has the Property
against all *but* the rightful Owner; NOT *against* HIM.

Sir *Richard Lloyd* in Reply—

I agree that the Holder of the Note has a *Special* Property: But
it does not follow that he can maintain *Trover* for it, *against the*
true Owner.

This is not only *without* but AGAINST the Consent of the Owner.

Supposing this Note to be a Sort of *mercantile* Cash; yet it has an
Ear-Mark, by which it may be distinguished: Therefore *Trover*
will lie for it. And so is the Case of *Ford v. Hopkins*.

And You may recover a Thing stolen from a Merchant, as well
as a Thing stolen from another Man. And this Note is a mere
Piece of Paper: It may be as well stopped, as any other Sort of
Mercantile Cash, (as, for Instance, a *Policy* which has been stolen.)
And this has NOT *been passed away* in Trade: but remains in the
Hands of the true Owner. And therefore it does not signify in
what Manner they are *passed away*, when they are *passed away*:
For this was NOT *passed away*. Here, the true Owner, or his
Servant (which is the same Thing,) detains it. And, surely, *Rob-*
bery does not *devest the Property*.

This is not like Goods sold in *Market Overt*: Nor does it pass
in the Way of a *Market Overt*; nor is within the Reason of a *Mar-*
ket Overt. Suppose it was a *Watch* stolen: The Owner may seize
it, (though he finds it in a *Market Overt*,) *before* it is sold there.
But there is no *Market Overt* FOR *Bank Notes*.

I deny the Holder's (merely *as* Holder) having a Right to the
Note, *against the* TRUE Owner: And I deny that the *Possession*
gives a Right to the Note.

Upon this Argument on *Friday* last, *Ld. Mansfield* then said that
Sir *Richard Lloyd* had argued it so ingeniously, that (though he
had no Doubt about the Matter,) it might be proper to look into
the Cases he had cited, in Order, to give a properer Answer to
them:

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* P. 457. * them: And therefore the Court deferred giving their Opinion, to this Day. But at the same Time, Ld. *Mansfield* said He would not wish to have it understood in the City, that the Court had any *Doubt* about the Point.

Lord MANSFIELD now delivered the Resolution of the Court.

After stating the Case at large, He declared that at the Trial, He had no Sort of Doubt, but that this Action was *well* brought, and *would lie* against the Defendant in the present Case; upon the *general Course of Business*, and from the *Consequences* to Trade and Commerce: which would be much incommoded by a contrary Determination.

It has been very ingeniously argued by Sir *Richard Lloyd*, for the Defendant. But the whole Fallacy of the Argument turns upon comparing Bank-Notes to what they do *not resemble*, and what they *ought not* to be compared to, *viz.* to Goods, or to Securities, or Documents for Debts.

Now they are *not* Goods, not Securities, nor Documents for Debts, nor are so esteemed: But are treated as *Money*, as *Cash*, in the ordinary Course and Transaction of Business, by the general Consent of Mankind; which gives them the Credit and Currency of *Money*, to ALL Intents and Purposes. They are as much *Money*, as Guineas themselves are; or any other current Coin, that is used in common Payments, *as* Money or Cash.

They pass *by a Will*, which bequeaths all the Testator's Money or Cash; and are *never* considered as *Securities* for Money, but as *Money itself*. Upon Ld. *Ailesbury's* * Will, 900 *l.* in Bank-Notes was considered as *Cash*. On *Payment* of them, whenever a Receipt is required, the Receipts are always given *as* for *Money*; NOT as for *Securities* or *Notes*.

* Popham et al. v. Bathurst et al. in Chancery, 5th November 1748.

So, on Bankruptcies, they can not be followed as identical and distinguishable from Money: But are always considered as *Money* or *Cash*.

'Tis pity that Reporters sometimes catch at quaint Expressions that may happen to be dropped at the Bar or Bench; and mistake their Meaning. It has been quaintly said, "that the *Reason why* Money can not be followed is, BECAUSE it has *no Ear Mark*:" But this is NOT *true*. The *true Reason* is, upon Account of the *Currency* of it: It can not be recovered after it has passed in *Currency*. So, in Case of *Money stolen*, the true Owner can not recover it, *after* it has been paid away fairly and honestly upon a valuable
and

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*and *bonâ fide* Consideration: But *before* Money has passed in Cur- * P. 458. rency, an Action may be brought for the *Money itself*. There was a Case in 1 G. 1. at the Sittings, *Thomas v. Whip*, before Ld. *Macclesfield*: Which was an Action upon *Assumpsit*, by an Administrator against the Defendant, for Money had and received to his Use. The Defendant was Nurse to the Intestate during his Sickness; and, being alone, conveyed away the *Money*. And Ld. *Macclesfield* held that the Action lay. Now this must be esteemed a *Finding*, at least.

Apply this to the Case of a *Bank-Note*. An Action may lie against the *Finder*, 'tis true; (and it is not at all denied:) But NOT *after* it has been PAID AWAY IN CURRENCY. And this Point has been determined, even in the Infancy of Bank Notes: For 1 *Salk.* 126. *M. 10 W.* 3 at *Nisi prius*, is in * Point. And Ld. * V. ante 454. Ch J. *Holt* there says that it is "by *reason of the Course of Trade*; " which creates a Property in the Assignee or Bearer." (And "the " Bearer" is a *more proper* Expression than *Assignee*.)

Here, an Inn-keeper took it, *bonâ fide*, in his Business, from a Person who made the Appearance of a Gentleman. Here is no Pretence or Suspicion of COLLUSION *with the Robber*: For this Matter was strictly inquired and examined into at the Trial; and is so stated in the Case, "that he took it for a *full and valuable Consi-* " *deration*, in the *usual Course of Business*." Indeed if there had been any *Collusion*, or any Circumstances of *unfair Dealing*; the Case had been much otherwise. If it had been a Note for 1000 *l.* it might have been suspicious: But this was a *small* Note, for 21 *l.* 10 *s.* only: and *Money given in Exchange* for it.

Another Case cited was a loose Note † in 1 Ld. *Raym.* 738, ruled by Ld. Ch. J. *Holt* at *Guildhall*, in 1698; which proves nothing for the Defendant's Side of the Question: But it is exactly agreeable to what is laid down by my Ld. Ch. J. *Holt*, in the Case I have just mentioned. The Action did not lie against the Assignee of the Bank-Bill; BECAUSE he had it for *valuable* Consideration. † Ex relatione of another Person.

In that Case, he had it from the Person who found it: But the Action did not lie against him, *because* he took it in the *Course of Currency*; And *therefore* it could not be followed in his Hands. It never shall be followed into the Hands of a Person who *bonâ fide* took it in the *Course of Currency*, and in the *Way of his Business*.

The Case of *Ford v. Hopkins*, was also * cited: Which was in * V. ante 454. *Hil.* 12 *W.* 3. *coram Holt* Ch. J. at *Nisi prius*, at *Guildhall*; and was an Action of Trover for Million-Lottery Tickets. But this must be a very *incorrect* Report of that Case: It is *impossible* that it can be

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* P. 459. * true Representation of what Ld. Ch. J. *Holt* said. It represents Him as speaking of *Bank-Notes*, *Exchequer-Notes*, and *Million-Lottery Tickets*, as LIKE to each other. Now no two Things can be more UNLIKE to each other, than a *Lottery-Ticket*, and a *Bank-Note*. *Lottery Tickets* are *indentical* and *specific*: *Specific Actions* lie for them. They may prove extremely unequal in Value: One may be a Prize; another, a Blank. *Land* is not more specific, than *Lottery-Tickets* are. It is there said, "That the Delivery of the Plaintiffs Tickets to the Defendant, as that Case was, was *no Change of Property*." And most clearly it was *no Change of the Property*: So far, the Case is right. But it is here urged as a Proof "that the true Owner may follow a *stolen Bank-Note*, into what Hands soever it shall come."

Now the whole of that Case turns upon the throwing in *Bank-Notes*, as being LIKE to *Lottery-Tickets*.

But Lord Ch. J. *Holt* could never say "That an Action would lie against the Person who, *for a valuable Consideration*, had received a *Bank-Note* which had been stolen or lost, and *bonâ fide paid to him*;" even though the Action was brought by the true Owner: Because he had before determined *otherwise*, but two Years before; and because *Bank-Notes* are not like *Lottery-Tickets*, but *Money*.

The Person who took down this Case, certainly misunderstood Lord Ch. J. *Holt*, or mistook his Reasons. For this Reasoning would prove, (if it was true, as the Reporter represents it) that if a Man paid to a Goldsmith 500 *l.* in *Bank-Notes*, the Goldsmith could never pay them away.

A *Bank-Note* is constantly and universally, both at Home and Abroad, treated as *Money*, as *Cash*; and paid and received, as *Cash*: And it is necessary, for the Purposes of Commerce, that their *Currency* should be *established* and *secured*.

* *Walmesly*
against *Child*,
11th Decem-
ber 1749.

There was a Case in the Court of Chancery, * on some of Mr. *Child's* Notes, payable to the Person to whom they were given, or Bearer. The Notes had been lost or destroyed many Years. Mr. *Child* was ready to pay them to the Widow and Administratrix of the Person to whom they were made payable; upon her giving Bond, with two responsible Sureties, (as is the Custom in such Cases,) to indemnify Him against the Bearer, if the Notes should ever be demanded. The Administratrix brought a Bill; which was dismissed, because she either could not or would not give the Security required. No Dispute ought to be made with the Bearer of a *Cash-Note*; in regard to Commerce, and for the Sake of the Credit of these Notes: Though

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* Though it may be both reasonable and customary, to *stay* the Payment, *till* Inquiry can be made, Whether the Bearer of the Note came by it *fairly*, or not. * P. 460.

LORD MANSFIELD declared that the Court were All of the same Opinion, for the Plaintiff; And that Mr. Just. WILMOT concurred.

RULE—That the *Poslea* be delivered to the PLAINTIFF.

Rex *vers.* Dr. Shebbeare

Wednesday,
1st February
1758.

THE Doctor was brought up to be bailed: But had not Bail ready.

Note—He was now brought up by Virtue of a *Habeas Corpus* ISSUED by the Ld. Ch. Justice in the *Vacation*, returnable *immediate*, before Himself at his *Chambers*.

Upon Dr. *Shebbeare's* mentioning that He had been informed “that, as the Term was begun, it was necessary to take out a *new* Writ of *Habeas Corpus*, to bring Him into Court;” And the Officers on the Crown-Side having said that *their* Notion of the *Practice* was, “That, the *Term being begun*, the *old* Writ was *expired*, and it was necessary to take out a *new* One;”

LORD MANSFIELD declared the Court to be unanimously of Opinion That such Notion was *ill founded*; That a Person *might* be brought into Court upon a *Habeas Corpus* issued in the *Vacation*; and that to require a new Writ, would be attended with Delay and Expence, without the least Reason or Utility.

Lord MANSFIELD—If you have not Bail, We cannot commit you to the same Custody you come hither in, (which was that of Mr. *Carrington*, One of the King's Messengers;) but must commit you to our Marshal: And you will not then be obliged to sue out your *Habeas Corpus* again; but may be brought up from the Prison of this Court, by a *Rule* of Court, whenever you shall be prepared to give Bail.

Accordingly, the Doctor, being charged with two Warrants under the Hand and Seal of the Secretary of State, * which appeared upon the Return to the *Habeas Corpus*, was

* See the
Charge, post
pa.

COMMITTED to the Custody of the *Marshal* of this COURT.

Rex

Hilary Term 31 Geo. 2.

* P. 461.

Saturday, 4th
February
1758.

* Rex *vers.* Inhabitants of Flecknow.

H. 30 G. 2. N^o 6.

THIS was a Cause in the Crown-Paper, upon a special Case from the Assizes in *Warwickshire*; upon an Indictment against the Inhabitants of the Hamlet of *Flecknow*, for *not repairing a Highway*, which the Indictment lays, “that THEY ought to repair.”

The Inhabitants pleaded “that *One George Watson* ought to repair it, by reason of his Tenure; so LONG as the same should remain inclosed, &c.” And traverse that the Defendants, the Inhabitants, ought to repair it.

The Replication sets out an Act of Parliament of 15 G. 2. c. (a private Act) “for inclosing and dividing the Common Fields called *Flecknow*, in the County of *Warwick*, into just Allotments and Proportions; And also the several Proceedings under it; and then traverses “that the said *George Watson* by reason of his inclosing the said Highway, ought to repair and amend it, as often as there should be Occasion, whilst it should remain so inclosed by him,” *modo et forma prout* is alledged by the Plea: *Et hoc paratus est verificare.*

The Rejoinder admits the Act, and the Proceedings under it, and *George Watson's* Acceptance &c. under them; and alledges that *George Watson* by reason of his inclosing, ought to repair &c: And of this they put themselves upon their Country.—Issue is taken thereon; And a Verdict *pro Rege*, subject to the Opinion of this Court.

The Case stated, by Consent of Counsel was (in Substance) thus—The *Inhabitants* of the Hamlet of *Flecknow*, BEFORE the making the Inclosure by Virtue of the Act of Parliament in the Record mentioned, were bound to repair the Highway in Question.

The Road in the Pleadings mentioned, was, before the Making the said Act of Parliament, an ANCIENT OPEN Road, lying un-inclosed, without Hedge Ditch or Fence; and continued to lie so un-inclosed at the Time of making the said Act of Parliament, and until the Inclosure thereof as hereafter mentioned.

The Commissioners apointed by the said Act of Parliament did, in Pursuance of the said Act, by their Award in Writing, duly award, ascertain

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* *ascertain, set out, direct, and appoint* " That there should be at * P. 462.
" all Times, for ever, after the new Inclosure by the said Act
" directed to be made, *A Public Way or Road*, leading from the
" Hamlet of *Flecknow* aforesaid, to *Southam* in the said County of
" *Warwick*, and also from *Southam* aforesaid to *Flecknow* aforesaid
" (being the Road in Question,) for Persons to pass, either on Foot
" Horseback, or with Cattle and Carriages, into over and through
" the ALLOTMENT of the said *George Watson*; And that the same
" should be and remain at all Times for ever thereafter, *full forty*
" *Feet broad*, as the same was then admeasured and set out." And
the Case states that within One Year after making the said Award,
(that is to say, in *January 1745*,) the said *George Watson* inclosed
his Allotment, pursuant to the said Act of Parliament: And the
Highway in question *lay open and uninclosed* on each Side thereof
as aforesaid over the Lands Part of the Allotment of the said *George*
Watson, for the Space of *THREE Years* next after the Inclosure of
his said Allotment so by him made as aforesaid.

The said *George Watson*, at the End of the said *THREE Years*,
INCLOSED with *Hedges Ditches and Fences* the said Highway, on
both Sides thereof, leaving the same full forty Feet broad between
the Ditches: And the said Road or Highway *remained so inclosed by*
the said *George Watson*, during the whole Time mentioned in the
Indictment.

The said *George Watson* made *no* Inclosure of the said Highway
in Question, *other* than as aforesaid.

A Verdict by Consent was found by the Jury; Whereby the De-
fendants were found guilty: But such Verdict was to be subject
to the Opinion of this Court, upon the whole Case, as it appears
on the Pleadings and on what appeared to be and was the Case as
is before mentioned. And the

QUESTION submitted is Whether the *Inhabitants* of the said Ham-
let of *Flecknow* CONTINUED bound to repair the Highway in the
said Indictment mentioned, NOTWITHSTANDING the said INCLO-
SURE by the said *George Watson* in manner before stated: Or Whe-
ther, by reason of SUCH INCLOSURE, they were DISCHARGED there-
from, DURING the Time in the Indictment specified.

Serj. *Hewett pro Rege*, argued That the *Inhabitants* remained
STILL bound,

It is admitted that this Hamlet of *Flecknow* was bound to repair
before the Act of Parliament. And it does not appear that *George*
Watson is bound by having inclosed, under this Act of Parliament:

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* P. 463. * For this is *no Incroachment, no Injury to the Public, no Act done without Consent.*

And the Cases turn upon WANT of lawful Authority. 1 Ro. Abr. 390. Letter A. pl. 1. Sir Edward Duncombe's Case: Outlets are Parcel of the Highway, in an open Field. *Ibid.* Letter B. pl. 1. "The Subject may go out of the beaten Track, when the Way is foundrous in an open Field." *Sheppard's Epitome of the Law* 1116. "If a Man inclose the Highway, and put it within his own Ground, the Parish is not to repair it; but He must repair it himself:" 2 Saund. 160. Rex v. Sir Nicholas Stoughton: An Encroacher upon the Highway, is obliged to repair, so long as the Encroachment continues. *Style* 364. "Whoever incloses &c. takes upon him to repair."

But *this* Inclosure and Allotment is *under an Act of Parliament*; to which *Every Body consents*. And this Act directs public and private Highways to be laid out: And it provides "That No-Body shall go upon *any other Highway*." Therefore the old Right to the old Way is at an End, is annihilated: And so is the Way itself, being exchanged for the new One. And this, of Course, warrants the Inclosure.

But the Act lays no Charge upon the Owner: Therefore *George Watson* cannot be said to have inclosed any part of the Highway: For this Land is allotted to him, as his *private Property*; And He is warranted in making this Inclosure.

This is just like the Case of a Writ of *Ad quod damnum*: It is indeed a *Parliamentary Ad quod damnum*. It may be even worth the Inheritance of the Land, to repair the adjoining Highway. So that this is *not within the PRINCIPLES* which oblige Persons inclosing, to repair. And if *George Watson* be *not* obliged to repair this Highway, the Inhabitants of *Flecknow* are obliged.

Mr. *Caldecott contra* for the Defendants. This is an Indictment against the Inhabitants for not repairing: And it only charges "that they are bound."

The Plea sets out by Way of Inducement "That one *George Watson*, by reason of his Inclosure, ought to repair:" And then tenders a Traverse "that the Inhabitants OUGHT NOT to repair."

The Replication (instead of taking Issue upon this Traverse,) sets out the Act of Parliament, and then sets out all the Proceedings under it, and the Allotment to *George Watson*, and his Acceptance thereof, and his Inclosing his Allotment, first, and the Road afterwards; and then takes quite another Traverse, *viz.* "That He
" the

Hilary Term 31 Geo. 2.

“ * the said *George Watson*, is not, by his inclosing the Road, bound * P. 464
“ to repair it.”

Cur'—We cannot meddle with the *Pleadings*, now: We are upon the *Special Case*. If You have any Objection to the *Pleadings*, You must move in Arrest of Judgment.

Mr. *Caldecott* then proceeded on the *Case*. This was a Road, which was always an open and un-inclosed Road, and went over *George Watson's* own Lands.

1st. This is no Inclosure, WITHIN *this Act*.

2d. If it was, Yet the Act does *not take away the legal Consequence* of Inclosure.

First—This was an old open un-inclosed Road, over this *George Watson's* own Lands. And the Act does not give any Authority to inclose it; nor could intend any such Thing. And it is much better for the public, that it should be open and un-inclosed, than that it should be inclosed. If He will inclose it, He ought to repair it.

It is here stated that he did inclose his *Allotment* within two Years (the Time limited for so doing:) But that he did not inclose this Road, till THREE Years after the Commissioner's Award. Therefore it is *not* an Inclosure *under* this Act: Consequently, he is *liable* to repair.

I agree that if a Man incloses on both Sides of a Road, he shall repair the Whole: And if &c. And if &c. [See *Hawkins*, as below.] There is a great deal on this Subject in 1 *Hawk. P.C.* 202. *Lib. 1. c.* 76. § 6, 7. And I agree that a Man is bound to repair, *no longer* than WHILST *he continues his Inclosure*: So that if he opens his Inclosure, he will be discharged.

As to an *Ad quod damnum*—It makes the old Road to become private Property: And there ought to be a Grant from the Crown.

But this Act of Parliament has *not directed an Inclosure* of the Road in Question: *Neither* does the *Award of the Commissioners* direct it. Therefore *George Watson* is in this obliged to repair; And the Inhabitants are not obliged.

Lord MANSFIELD stopped Mr. Serjeant *Hewitt* from replying: For this Case was too plain, He said, to need a Reply.

An

Hilary Term 31 Geo. 2.

* P. 465. * An Owner of Land over which there is an open Road, may *inclose* it, by his *own* Authority; or *alter* it, under a *proper* Authority, and by a legal Course. 1st. He may *inclose* it, by his *own* Authority: But then it must be upon *two* Conditions—One, “that he is *obliged to repair* it, *TILL* he throws up the Inclosure;” the Other “that he leave sufficient Space and Room for the Road.” 2dly. The Other Act, *viz.* *Altering or changing* the Road by a *legal Course*, is by a Writ of *Ad quod Damnum*: where the Application is to be made by the Owner of the Lands; and a Licence given by the King, upon a Finding by a Jury. But in this *latter* Case, the Owner of the Land, is *not* obliged to repair the new Road; *unless* the Jury impose such a Condition upon him: For if they do not, the Repair of the Road stands *just as it did before*: even though it was at first open, and should be directed by the Jury to be inclosed.

And this Case is *like* a Writ of *Ad quod damnum*; and not only so, but even *more* than a Writ of *Ad quod damnum*. For here, the Act vests a Power in the Commissioners, to set out *new* Roads, by their Award. Therefore there is an *End* of the old Road, *as* an old Road. And the Commissioners here made their Award: In which they describe the future Road, and direct it to be 40 Feet broad, as it was then admeasured.

And these Common Fields were not designed to continue open Fields, as they were before: but the Intent of the Act of Parliament was that they might be inclosed. And the Act says nothing about the Expence of repairing the Road. Therefore the Repair clearly *stands as it did before*; and was *certainly meant so to do*.

And every Man had Right to inclose, whose Lands adjoin to the Road. But if the Person to whom the Allotment was made near the Highway, was to be obliged to repair, it might have made a vast *Difference in the Value* of the Lands respectively allotted to each Person: For one Person's Allotment might perhaps run along very far, by the *Side* of the Highway; and another Person's Allotment *not lie at all near it*. And yet there is no Provision for any such Case.

Therefore this *George Watson* is not, upon the Facts here stated to Us, obliged to repair, *by Reason* of his having *inclosed an open Road*: Nor indeed *is it an open Road*, under the Circumstances of this Case.

The Parish were bound to repair, before the Act: And this Road happens too to be the same identical Road, that was the Road before

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* fore the Act. And the Act of Parliament *never designed* to alter * P. 466.
the Charge and Obligation of repairing the Roads over these Fields
which were intended to be inclosed by virtue of it: Nor is this In-
closure thus made under this Act, *such* an Inclosure as comes within
the Meaning of the Law, which obliges the Person inclosing a
Road *voluntarily* and of his own Head, to repair the Road which
he has so *voluntarily* inclosed.

*This shows, that
the Act did
not mean to disturb
the case in
Ch. 366.*

Mr. Just. DENISON concurred: And He thought this Case was
very *properly* compared to the Case of an *Ad quod damnum*; and
that it might be very properly called a *Parliamentary Ad quod dam-*
num.

And He was very clear that the *Hamlet were bound* to repair, *just*
as they were before: And that *this* Inclosure was *not* such an In-
closure as the Cases cited intend.

Mr. Just. FOSTER likewise concurred. And He thought the
Act *intended* to give the Person to whom an Allotment adjoining
to the Road, should be made, *Power to inclose*: Or otherwise he
might be a very great Sufferer by such Allotment. And He was
extremely clear that the *Hamlet remained bound* to repair the Road,
just as much as they were bound to repair before the Act.

Mr. Just. WILMOT concurred too, clearly: And the rather, for
that if it was not so, the Allotment might prove what the Civil
Law terms a *damnosa Hereditas*. And the Allotments to the dif-
ferent Persons might be of extreme different Values, according as
they lay near to, or far from the Road.

Upon all the Circumstances of the Case, He was clear that the
Hamlet remained liable, in the same Manner as they were before the
Act.

Per Cur. unanimously

RULE for the *Poslea* to be delivered to the *Prosecutor*.

Turner *vers.* Turner.

THE COURT (Mr. Just. FOSTER being gone) were unani-
mous, that a Person VOLUNTARILY *inlisting* HIMSELF, was
NOT *privileged from Arrests*, within the Act of last Sessions
(30 G. 2. c. 8.) “for the speedy and effectual Recruiting of his
“Majesty’s Land-Forces and Marines:” For that the Act was only
meant to privilege SUCH Persons from Arrests, as were, under
that Act, * COMPELLED *against* their Wills, to serve as Soldiers.

* V. Section 20th, *pa.* 217, 218.

5 Y

Sir

Hilary Term 31 Geo. 2.

* P. 467. * Sir Edward Worfeley & al. Assignees of Richard Slader,
a Bankrupt, *vers.* Demattos and Slader.

Tuesday, 7th
February
1758.

THE present Question came before this Court, after a Trial at Law before Lord *Mansfield*, upon a feigned Issue out of the Court of Chancery, to try, Whether one *Richard Slader*, a Trader, was a Bankrupt; And (2dly.) *If* he was a Bankrupt, then Upon WHAT PARTICULAR Day he became so: And *that* particular Day on which he should be found to have become a Bankrupt, was to be *indorsed* upon the *Postea*.

It was soon agreed, as to the first Point, “That he certainly *did* “*become* a Bankrupt,” by an undoubted clear Act of Bankruptcy committed on the thirteenth of *November* 1756.

But, upon the second Point, as to the *Time when* he FIRST became a Bankrupt, It was insisted, on Behalf of the Plaintiffs, That he became a Bankrupt *anterior* to that 13th of *November*, *viz.* upon the 23d of *October*; namely, by the very *executing* the Deed in question, which bore the latter Date. For they alledged this Deed to be *fraudulent*; and the Executing it, to be *ipso facto* an Act of Bankruptcy, within the Statute of 1 Jac. 1. c. 15; * which Statute expressly makes any fraudulent Grant or Conveyance of the Trader's Lands or Goods, whereby his Creditors may be defeated or delayed of their just Debts, a *specific Act of Bankruptcy*.

* V. §. 2. of
that Act.

If the Deed *was* fraudulent, within the true Intent and Meaning of the Statute, He certainly committed an Act of Bankruptcy on the 23d of *October*: If it was *not*, He did not commit any Act of Bankruptcy till the 13th of *November*.

The Jury found Him a Bankrupt.

And, by Consent, the following Order was made at *Nisi prius*; *viz.* That either Party be at Liberty to move the Court. And if the Court shall, upon such Motion, be of Opinion “That the “Deed of 23d of *October* 1756, is, under All the Circumstances, “*fraudulent*, and the Execution of it by *Richard Slader*, an Act of Bankruptcy,”—Then the *Postea* shall be marked on the Back thereof, “That the said R. S. became a Bankrupt on the said 23d of “*October* 1756:” But if the said Court shall be of Opinion “That the Execution of the said Deed, under all the Circumstances, by the said R. S. be *not* an Act of Bankruptcy,” Then the said *Postea* shall be marked on the Back, “That the said “R. S. became a Bankrupt on the 13th Day of *November*.”

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* The Form of the *Rule*, under which it came before the Court * P. 468. was thus—"It is ordered that the Plaintiffs shew Cause why the
" *Postea* in this Cause should not be indorsed, that *Richard Slader*
" became a Bankrupt on the *thirteenth* Day of *November* 1756."

LORD MANSFIELD first repeated the whole Evidence very particularly and minutely : Which, after the Counsel had done, was resolved, by the Opinion of the whole Court, into the following Case ; *viz.*

James Davis, an Agent of *Isaac de Mattos*, knowing *Slader* to be indebted, and that he could not carry on his Trade, unless some body in *London*, in the Nature of a Banker, would pay his Draughts, negotiaed (in the Month of *July* 1756,) an Agreement between the said *Isaac de Mattos* and *Richard Slader*, " that *de Mattos* should
" pay *Slader's* Draughts, upon having Security."

The Nature of the Security, and the Terms of the Agreement, appear only by the Deed of the 23d of *October* ; prepared, and procured to be executed, by *James Davis* and *James Whitehead*, Both of them Agents of *Isaac de Mattos*.

The DEED in Question bears Date the 23d of *October* 1756 ; and recites *Slader's* Title to the Mill and Premises ; and also his being concerned in and carrying on divers Branches of Merchandize and other Business ; and his having frequent Occasion to draw and remit Sums of Money from and to *London* ; and his having requested *Isaac de Mattos* to be his Agent or Banker there ; And that in order to indemnify him for so doing, *Slader* had agreed to transfer and assign All his Estate and Interest in the Premises aforementioned in the said Indentures, and also ALL his Stock used and employed in the Trades of Brewing and Making Malt, and in the Business of a Corn-Factor and Miller, to the said *Isaac de Mattos* his Executors Administrators and Assigns, for that Purpose : And then the Deed imports that for the Purposes aforesaid, and in part of Performance of the said Agreement, and in Consideration of 5 s, He the said *Slader* Grants Assigns, &c, his said Messuage, Corn Water-Mill, and divers other Things (subject to a Mortgage then subsisting, on part thereof.) And further, in full Performance of the said Agreement, and for the Considerations aforesaid, He grants &c, ALL his Stock, Utensils, and other Things, used in his Trades of Brewing and Malting, and of a Corn-factor and Miller ; consisting of Coppers, Tuns, Backs, Coolers, Pumps, Cisterns, Skreens, and other Implements ; And ALSO ALL his changeable Stock consisting of Debts, Horses, Carts, Casks, Hops, Bear, Ale, Wheat, Barley, Malt, Coals, Wood, and ALL OTHER Goods and Commodities belonging

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* P. 469. * longing employed or made use of, *in the said several Trades* or any of them; And all his Estate, Right, Title, Interest, Property, Claim, and Demand whatsoever thereto, and to every or any Part thereof; to the said *Isaac de Mattos*, his Executors &c. *Defeazanced* however, on his the said *Slader's* paying and making good to the said *Isaac de Mattos* All the Sums of Money which he should advance and pay on any Note Draught Bill or other Writing of the said *Slader*; and on his indemnifying *de Mattos* against the same, and all Matters any ways touching or concerning the said Agency.

This Deed further contains the Common Covenants: And there is a Receipt indorfed for the 5*s*. Consideration-Money.

In it is also a Covenant that in Case of Breach of or Failure in the Conditions &c, or any Part thereof, *then and from thenceforth*, it should be lawful for the said *Isaac de Mattos* his Executors &c, to ENTER, POSSESS and ENJOY the said Land and Premisses &c; And ALSO to take to his and their own Use and Uses, absolutely, All and singular the Premisses *last* before-mentioned, *viz. the Stock, &c.*

Upon the 8th of *October*, *Richard Slader* drew a Bill upon *Isaac de Mattos*, by Authority from him for 200 *l*. But, to give it Credit, It was made payable to the said *James Davis*, and indorfed by him.

Upon the 23d of *October*, *Richard Slader* drew another Bill upon *Isaac de Mattos*, by Authority from him: But, to give it Credit, It was made payable to the said *James Whitehead*, and indorfed by him.

Isaac de Mattos himself personally knew that the Affairs of *Richard Slader* were in Confusion; and hired *Samuel Sills*, whom He sent down in the Month of *October*, to be Book-keeper to this *Richard Slader*. *Sills* accordingly went; and had examined all *Slader's* Accounts and Affairs, by the 20th of *October*.

The Deed, (which had been a considerable Time preparing,) was executed on the 23d of *October*; and is witnessed by the said *James Whitehead*, *James Davis* and *Samuel Sills*.

The Bankrupt continued in Possession of every Thing conveyed by the said Deed. And *James Davis* took Occasion to tell the Creditors of *Richard Slader*, "that the said *Slader* would do very well;" "that he had recommended him to two good Men;" and "that *Slader* had given a Mortgage of the Mill, and other Lease-hold Premisses:" But *James Davis* concealed and did not mention *Slader's* having assigned his GENERAL Effects.

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* Upon the 11th of November, Slader told Davis and Sills, both * P. 470. together, "that he *could not stand*;" and consulted them what to do: The Result of which Consultation was,—That Sills, by Order of Slader, the same Day, gave *Possession to Davis*, as Agent of *de Mattos*, who immediately set out for London. The next Day, (the 12th of November,) Slader ordered Sills to deny him: On the 13th Sills did deny him accordingly; and told the Reason, "that it was *to commit an Act of Bankruptcy*."

Slader had nothing of Value, *but* what was comprized in the Deed of the 23d of October: And he traded as a Brewer, Maltster, Cornfactor, and Miller; but carried on *no other Trade*.

After the 13th of November, *Isaac de Mattos* paid the said two Draughts indorsed by *Davis* and *Whitehead*.

After *Ld. Mansfield* had reported the Evidence, the Counsel for the Plaintiffs proceeded to shew Cause: And they urged the Deed to be *merely colourable*, and so *fraudulent* as to constitute, in itself, an Act of Bankruptcy; being to the *Intent to defeat and delay* his Creditors, or *whereby they MIGHT be DEFEATED or DELAYED*.

They cited 3 Co. 80. *Twine's Case*, and the Rules and Resolutions contained in it, and urged that the present Case was fully within it.

They also cited 13 Eliz. c. 7. and 1 Jac. c. 15. §. 2: which goes further than 13 Eliz. Likewise 2 Inst. 110. on the Statute of *Marlebridge*. 6 Rep. 76. *Curson's Case* S. P. *Moore* 193. *Ld. Paget's Case*, upon the Statute of Fugitives beyond Seas made Anno 13 Eliz. (In which, they observed that 13 Eliz. c. 3. is in *Rastal*, and not elsewhere.) *Style* 288. *Tucker v. Cosb.* 2 *Peere Wms.* 427. *Small v. Oudley et al.* Where a Goldsmith assigned $\frac{2}{3}$ of his Stock in the *Wine Trade*; And it was holden good: But *contra*, if it had been of ALL his Goods, &c.

Also *Lucas's Rep.* 489. *Dr. Goodfellow's Case*; and *Ryal v. Rowls* in *Canc.* 27th January 1749.

And they observed that here was no *Possession* altered; no *Estimate or Account* taken of the Stock &c; nor any *Consideration* paid.

The Counsel for the Defendants insisted, that even IF it was granted that this Deed was fraudulent, AS *against* Creditors or Purchasers, yet it would NOT be an ACT OF BANKRUPTCY: For * V. 13 Eliz. the * Act has a Proviso to except Deeds made *bonâ fide* and upon c. 7. § ult. good Consideration.

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* P. 471. * This Deed was made *bonâ fide*, and *upon good Consideration*. It was made by Mr. *Slader*, a Trader in the Country, to secure Mr. *De Mattos*, who agreed to become his Banker or Agent in *London*; and to permit *Slader* from the Country, to draw upon him in Town: And the *only* INTENT of it was to indemnify *De Mattos* against *Slader's* OVER-drawing. *Unwin v. Oliver*, in *Canc. Tr.* 12 G. 2. was a like Case, determined by the Lord Chancellor. And this Transaction tended to enable the Country Trader the better to carry on his Trade; and was far from being intended to deceive his Creditors.

It must be agreed, that this Deed of Assignment *includes Goods and utensils*, as well as the House and Mill &c; And that there was *no previous Appraisement*. But *that* was quite unnecessary: Because it could not be *then* known *how much* Money was to be secured.

As to the Owner's *continuing in Possession*.—The Case of *Meggot v. Mills*, 1 *Ld. Raym.* 286. *B. R.* 1697. was so; and yet not fraudulent. *Precedents in Chancery* 285. *Bucknall et al' v. Roiston* was the like. And in the Nature of the Thing, Possession could not be delivered in the present Case; because the Debt to be secured was future and uncertain. So that *this Continuing in Possession* was *no mala Fides*, *no Badge or Evidence of Fraud*: Because it did not give the Owner *a false and fallacious Credit*. Neither was it *secret*; but notorious: And it was *NOT with Intent to defeat and delay* his Creditors; but to their Benefit, and calculated to support *Slader's* Credit, and to enable him to pay his Creditors.

The GENERALITY of a Deed is *not always* and *necessarily* an *Evidence of Fraud*: For unless there be a *Trust*, either expressed or implied, there is no Fraud: And here is no Trust, either expressed or implied: Nor could *De Mattos* recover more than was fairly owing to him.

The Case of *Ryal v. Rows* was rightly determined, “that a Secrecy may be lost, by suffering a Continuance in Possession.” But it does not follow that our Continuance in Possession *constituted an Act of BANKRUPTCY*. Here was neither Imposition nor Collusion: It is only a Mortgage of his Personal Property, and for a fair Consideration.

To prove it *NOT* to be an *Act of Bankruptcy*, they cited several Cases. In the Case of *De Gols v. Ward*, in 1739. the *quo animo* was indeed clear and plain. The next Case where a Deed was considered as an Act of Bankruptcy, was *Ashley's Case*: But that was also

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* also quite clear: So again, in *Mackrell's Case*, lately: Where it * P. 472. was indeed given up. But there is *nothing* INTENTIONALLY ill, in the present Case.

If this mere Giving Security to indemnify his Banker was an Act of Bankruptcy, It could NEVER afterwards BE PURGED: Which would be a great Inconvenience to Trade; because it is a common Case. And this Man gave it to his former Banker, as well as to *De Mattos*.

It is no Act of Bankruptcy, unless the Deed be FRAUDULENT, as well as intended to give *unjust Preference to one Creditor* before Another. And there is no Pretence, in the present Case, that any bad Use has been made of this Deed.

The 5th Clause in 1 Jac. 1. c. 15. would be nugatory, if the second was to be understood to make the Executing such a Deed as this, an *ipso facto* Act of Bankruptcy. It was only a *contingent and collateral* Security, depending upon *future* Events and Circumstances: And therefore there could not, in the Nature of the Thing, be either *Delivery of immediate Possession*, or any *particular Consideration-Money* expressed. And *De Matto's* being *liable* to be damnified was, of itself alone, a *good Consideration*.

The Case of *Unwin v. Oliver*, P. 12 G. 2. in *Canc.* was this: *Unwin*, being appointed Receiver by that Court, and thereupon obliged to give Security, assigns his Debts, as a Security (amongst other Things) to the Persons who were bound for him in a Recognizance upon that Occasion: And afterwards he became Bankrupt. *This Assignment* of his Debts was holden good.

Bankruptcy is considered by the Acts of Parliament, as a CRIME. The Description of an Act of Bankruptcy, or of Person's becoming Bankrupt, must be therefore taken *strictly*: And the Acts that constitute Bankruptcy must be done *with Intent* to defraud or delay Creditors.

Put the Case of an Officer in the an Revenue appointing a *Trader* his *Deputy*; And, for his Indemnity, *taking* from such Deputy, *such a Deed as this* is: Would the *Executing* it make the Trader a Bankrupt?

The Act of 21 Jac. 1. c. 19. § 10, 11. takes Care of any Inconvenience to the Creditors, arising from the Trader's continuing in Possession. But such Assignments have *never* been considered as constituting an *Act of Bankruptcy*. *Small v. Oudley*, 2 Peere Wms. 427. *Jacob v. Shepherd*, there cited. *Ryal v. Rows*, in *Canc.* 27 Janu-

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* P. 473. 27 January 1749: Which was an Assignment by *Harvest* the Bankrupt, of *all* his Goods Utensils &c. and was made liable to *future* Monies to be advanced.

The Counsel for the Plaintiffs in Reply, urged the Inconvenience that must arise to Trade, from such *General* Assignments of *All* a Trader's Effects in Trade, *un-valued* and *un-appraised*; in Order to secure *eventual Debts*, not existing at the Time of executing the Deed: And insisted that 1 Jac. 1. c. 15. § 2. *expressly* makes such Conveyances *Acts of Bankruptcy*.

Here is *no Consideration* of any Money paid, or any Debt really contracted. Nor was any Money *afterwards advanced* upon this Deed. And for what was *then owing* to Mr. *De Mattos*, he had at *that Time* a *Warrant of Attorney*, to confess and enter up a *Judgment*: Though it was afterwards destroyed, when he actually took Possession under the Deed now in Question.

And indeed, IF *there HAD been a real Debt* subsisting, Yet *this* had been an *undue Preference*, within the Act. But as it was *not* so, nor any thing done in Consequence of this Deed, it is merely *fraudulent*.

None of the Cases, on either Side, are in Point.

In *Unwin's Case*, there was a Consideration: For an *Indemnity* is a *good Consideration*. And the Case goes no further than to prove "that it is so."

But of moveable Chattels, *Possession* ought to be instantly and *actually* given: And of immoveable or remote Chattels, Possession of every *Title* to it, and every Thing that can in the nature of the Thing, be done *towards it*.

Whereas here was *no Attempt* to take Possession; *till* the Man was determinately going to become Bankrupt, by a plain indisputable Act, on the 11th of *November*.

Therefore this *General* Provision for *one* particular Creditor, *implied a secret Trust* or conciliating Favour: Which is a Badge of *Fraud and Collusion*. And no Argument can be drawn from Mortgages of *Land*, (where it is the *usual* Method for the Mortgagor to remain in Possession) to the keeping Possession of *Goods* assigned over. And if this had been an honest Transaction, there would have been an *Appraisement* and a *Schedule*; and it would not have been left *thus at large*.

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* As to it's not being to be afterwards *purged*;—That does not * P. 474.
alter the Case at all: For no Act of Bankruptcy can be purged,
but by obtaining a Certificate.

As to 21 Jac. 1. c. 19. § 11. Continuing in Possession was always
looked upon as an *Evidence* of Fraud: That Law is only *declara-*
tive of what was the Law before.

The Cases cited of *Ward*, *Asbley*, and *Macrell*, prove Nothing
against Us, at all.

LORD MANSFIELD said The Court would consider it, both
upon the particular Circumstances, and upon the general Prin-
ciples: And it would be proper to consider the Subject, with
regard to *Traders in general*, under 13 Eliz. c. 7. as well as
to *Traders becoming Bankrupts*. And They would give No-
tice when they were ready to declare their Opinion.

LORD MANSFIELD now delivered the Opinion of the Court.

The Question is, Whether upon *all the above Circumstances*,
Slader became a Bankrupt on the 23d of *October*, or on the 13th
of *November*.—And the *Postea* is to be indorsed, as to the *Time*
of *Slader's* becoming Bankrupt, according to the Opinion of the
Court.

All the Acts concerning Bankrupts are to be taken together, as
making *One System* of Law: They are All to be construed *favour-*
ably for Creditors, and to *suppress Fraud*.

“ Whether a Transaction be fair, or fraudulent,” is often a
Question of * *Law*: It is the *Judgment of Law*, upon Facts and In-
tents. * Vide ante
397. accord.

The *Indemnity*, which is the Consideration of the Deed in Ques-
tion, I allow to be a good, valuable, and true Consideration: And
I allow this Deed to be a valid Transaction, As between the *Par-*
ties.

But valid Transactions, as between the *Parties*, may be fraudulent
by Reason of *Covin*, *Collusion*, or confederacy to injure a *third*
Person: For Instance—*A.* buys an Estate from *B.* and forgets to
register his Purchase Deeds: If *C.* with express or implied Notice
of this, buys the Estate for a full Price, and gets his Deeds regi-
stered; This is fraudulent, because he assists *B.* to injure *A.* Or,
If a Man knowing that a Creditor has obtained a Judgment against
his Debtor, buys the Debtor's Goods, for a full Price, to enable
6 A him

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* P. 475. * him to defeat the Creditor's Execution : It is fraudulent. Again, If a Man, knowing " that an Executor is wasting and turning the " Testator's Estate into Money, the more easily to run away with " it," buys from the Executor, with that View, though for a full Price ; It is fraudulent.

Marriage-Brocage Bonds, secret Agreements, different from the open Treaty of Marriage, and many other Cases that might be put, though for a true and valuable Consideration, as between the *Parties*, are fraudulent, by Reason of Deceit or Injury consequentially brought upon *third* Persons.

* 3 Co. 80.b. * *Twyne's Case*, even in a Criminal Prosecution was of this
81. a. Sort: The Consideration of the Sale was more than sufficient, and undoubtedly true.

Whether *this* Deed be of that Sort, will depend upon the whole Purpose of it.

As to All, except the Leasehold, It could not have the Effect of a Conveyance, if *De Mattos* permitted *Slader* to *continue in Possession*.

By the express Tenor of the Deed, *Slader* was to have the absolute Order and Disposition as before. In Fact, he was permitted to continue in Possession, and *act as Owner*. They who dealt with him, trusted to his visible Trade and Stock. They trusted to the Bankrupt-Law that he could neither have sold or mortgaged; and, in Case of a Misfortune, that his Effects must be equally distributed. They were imposed upon by *false Appearances*.

To deceive the more, under a fictitious Shew of Credit, the Bills drawn upon *De Mattos* were made payable to and indorsed by his *own Agents*. *Davis*, One of his Agents, expressly told the Creditors, " That *Slader* would do very well ; That Two good Men, " upon Security of the Leasehold, would pay his Draughts : " But *concealed* that he had mortgaged any Thing else.

A false Shew, by Collusion, to deceive third Persons, is generally connected with a *secret Confidence*. So here, the Trust put in *Slader* manifestly was, That when he could stand no longer, he should give Notice to *De Mattos* or his Agents, deliver Possession, and then commit a positive Act of Bankruptcy.

From the Nature of the Fund, Possession never could be meant to be taken, but as the immediate Fore-runner of a Commission of Bankruptcy. He could not stand a Moment, after his whole Trade

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* Trade, fixed and fluctuating Stock, and Credits were taken from * P. 476. him.

To watch *Slader*, *De Mattos* put *Sills* about him, as his Book-keeper. Agreeably to the Confidence put in him, when *Slader* saw he could stand no longer, He acquainted *Sill's* and *Davis* the Agent of *De Mattos*, with it; and by their Advice, first gave an Order to deliver Possession, and then to be denied. This shews, to a Demonstration, that they were All aware that *Possession was necessary*; and intended from the first, by a formal Delivery of Possession, when he was determined to break, to evade the * Clause in 21 Jac. * § 11. i. c. 19. For the Measure was instantly taken, without any new Advice.

I will consider this Transaction more particularly, in two great Views:

1. In Respect of the *End*;

2dly. In Respect of the *Means*.

As to the first—The *End* proposed by the secret Trust was, that in Case *Slader* should become Bankrupt, his whole Estate should first be vested in *De Mattos*, for Payment of what was justly due to him. The *Preference* aimed at was *fraudulent* and *unlawful*.

Suppose, after the Consultation on the 11th of November, this Deed had been prepared and executed, accompanied with such formal Delivery of Possession: We are of Opinion, that it would have been *fraudulent*, and an *Act* of Bankruptcy.

Such *Preference* is a Fraud upon the whole Bankrupt Law, and would defeat the two main Objects it has in View; to wit, the *Management* of the Bankrupt's Estate; and an *equal Distribution* among his Creditors.

The Law gives the *Management*, to Persons chosen by the *Creditors*, under the Direction of Commissioners, and the Control of the Great Seal.

But, if a Bankrupt may convey all to a favourite and friendly Creditor, just before he orders himself to be denied; The whole Power of selling his Effects, calling in his Debts, and settling his Accounts, must be in *such* Single and particular Creditor: He must have a Right even to the Custody of the Books and Papers.

An

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* P. 477. * An *equal Distribution* among Creditors who equally gave a general personal Credit to the Bankrupt, is anxiously provided for, ever since the Act of 21 *Ja. 1. c. 19.*

* § 9. It was thought mischievous, to suffer Priorities to be gained by *secret Liens*; as * by Judgment, Statute, Recognizance, Bond, Specialties, Attachments by Custom in *London* or elsewhere, Assignment of Debt to the † King's Debtor. Unless they took out Execution, these All equally gave a personal Credit to the Bankrupt, and trusted *him* to manage his Effects.

† § 10. Conveyances of personal Chattels by way of Security, where *Possession* was left * *with the Bankrupt*, fell within the same Reason.

* § 11. LAND is held, *without* Perception of the Profits, by the TITLE: But there is *no* Hold of Goods, which the Mortgagor is allowed to possess and dispose of. Therefore by a † Clause in the same Act, any Priority by such *secret Lien* is also taken away; and, as such Mortgagee equally gives a general Credit, He is levelled with the *other* Creditors.

But, if a Bankrupt may, just before he orders himself to be denied, convey *All*, to pay the Debts of *Favourites*; the worst and the most dangerous Priority would prevail, depending merely upon the unjust or corrupt *Partiality* of the Bankrupt.

* Gayner,
Bankrupt.
Ex parte
Foord and
others.
† 31st July
1755.

A * Case lately happened, where a Conveyance calculated to *postpone* one Creditor to the rest, was held an Act of Bankruptcy. It came on before Ld. *Hardwicke*, the late Ld. Chancellor, at *Lincoln's-Inn Hall*, † One *Gayner*, a Trader, had made an Assignment on the 7th of *June* 1755, of all his Effects, Goods, Stock in Trade, and Book-Debts; (Except Household Goods, Watches, Plate, Bills of Exchange, Inland Bills, Promissory Notes, and Cash then by him,) to Trustees, in Trust to pay themselves and all the rest of his Creditors, *except Foord the Petitioner*. But the Trustees declining to act under *this* Assignment; He executed *another*, on the 9th of *June* 1755: Wherein the Trustees were to pay themselves, and all the Creditors mentioned in a *Schedule*; (in which Schedule, the Petitioner was *not* included:) And in this second Assignment a large Parcel of *Ginger*, as well as the Things above-mentioned were excepted.

The Petitioner insisted that he *alone* could choose Assignees; since the *other* Creditors claimed under the *Assignment*.

Ld. *Hardwicke* was clear, “ that the *executing* the Deed of the “ 9th of *June* was an *Act* of Bankruptcy.” And all that heard his

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*his Determination, were of the same Opinion: And every Body * P. 478. concerned acquiesced in it. Whereupon the Creditors mentioned in the Schedule, consented to wave all Benefit or Advantage under that Assignment; and all proved their Debts, in order to receive an equal Dividend with the Petitioner: And the Creditors proceeded to a Choice of new Assignees.

The Framers of this Deed executed by *Gayner*, took for granted, “that if it had been a Conveyance of *all* his Effects, it must be “bad;” and therefore they *colourably excepted Parts*. But the Contrivance did not prevail, even so far as to bear an Argument; or to be thought, by any Body, worthy of a Trial.

There is a great Difference between the Conveyance of *All*, and of a *Part*. A Conveyance of a *Part* may be public, fair and honest; As a Trader may *sell*; so he may *openly transfer* many Kinds of Property, by way of *Security*: But a Conveyance of *ALL*, must either be fraudulently kept secret: or produce an immediate absolute Bankruptcy.

It has been argued, “that *after a Resolution* taken by a Trader, “to commit an Act of Bankruptcy, the Trader so resolving to become Bankrupt, might lawfully prefer a just Creditor by conveying *Part* of his Effects, to satisfy that Creditor’s Debt.”

It is not necessary to determine that Question, in *this Cause*; for here the Conveyance is of *ALL*: And therefore I will only say, that no such Proposition is yet *established*; much less, in the *Extent* whereto it has been urged.

The Cases mentioned, were * *Cock v. Goodfellow*; † *Jacob v. V. Lucas* *Shepherd*; ‡ *Small v. Oudley*; and *Unwin v. Oliver*.

In the Case of *Cock v. Goodfellow*, the Fact did not give Rise to any Question. An immediate Prospect of a certain Bankruptcy was *not the Motive* to what Mrs. *Cock* did. She was *solvent* at the Time; and, that very Day, lent 40,000 *l*. Besides, her Children, to whom She was Guardian and Trustee, were not upon the Foot of *Common Creditors*: The Court of Chancery would have decreed Her to place their Fortunes out upon Government or real Securities.

As to the Case of *Jacob v. Sheppard*, I have looked into the Register’s Book, upon this Occasion: And I have a Note of it, as stated by *Ld. Hardwicke* in the Cause of *Bourne v. Dodson*. And it was this—

Mr. *Thomas Leigh*, (the Bankrupt,) who was a *Turkey-Merchant*, by Deed dated the 8th of *June* 1709, sold and conveyed *particular* Goods

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* P. 479. * *Goods* in the Hands of his Factors, to Mr. *William Snelling*; upon Trust to apply the Money arising thereby, in Satisfaction, in the first Place, of a Debt of 1500 *l.* due to *Snelling* himself; and then of a Debt of 1551 *l.* and Interest, due to *Geo. Morley*; and out of the Residue, to pay *such* of the Bankrupt's Creditors, as He, with *Morley's* Consent, *should direct*: And if there should be any Surplus after the said *Snelling's* and *Morley's* Debts were paid, and such Sums for which they were Bail or Security for the said Bankrupt, the same was to be paid to the said Bankrupt his Executors, Administrators and Assigns.

Afterwards, by Deed dated 16th *December* 1709, and by Deed dated 20th *January* 1709, other Debts were appointed to be paid, agreeable to the Power reserved by the former Deed.

On the 11th of *February* 1709, *Thomas Leigh* failed, and committed an acknowledged Act of Bankruptcy: And a Commission was taken out, and his Estate and Effects assigned.

* § 11. The Trusts of the Deed of the 8th of *June* 1709, were immediately, and openly carried into Execution: So that no Question ever did or could arise upon the * Clause of 21 *Ja.* 1. c. 19. But the Assignees brought a Bill against all the Parties claiming under the Deed of the 8th of *June* 1709, and the subsequent Deeds; “to have them set aside; and to have an Account of the Money which they had received;” upon two Grounds; 1st. That the Deeds were obtained by Fraud and Imposition on *Leigh* the Bankrupt; 2dly. That they were an Imposition upon the other Creditors.

The Cause came on to be heard at the *Rolls*, upon the 16th of *June* 1725. Sir *Jo. Jekyll* took time to consider of it; and ordered all the Pleadings and Proofs to be left with Him: and upon the 17th of *December*, Sir *Joseph* gave Judgment. He thought these Deeds could not be looked upon, or set aside, (upon the former Ground, viz.) as a Fraud upon the Bankrupt: But He declared the said Deeds to be FRAUDULENT, and an Imposition upon the Creditors of the Bankrupt; And decreed them to be set aside, with Costs.

In making this Decree, He went upon right Principles; but did not attend to it's being a Bankruptcy, if it was really fraudulent; And that a Court of Equity could not decree it to be fraudulent, unless it was fraudulent at Law; in which Case, it would constitute an Act of Bankruptcy, of itself.

On the 6th of *August* 1726, *Ld. King*, upon an Appeal, directed an Issue at Law, to try, “Whether by the Execution of the Deed

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“ * of the 8th of *June* 1709, *Thomas Leigh* became a Bankrupt; or at* P. 480.
“ any other, and what Time.” The Jury found he became Bankrupt on 11th *February* 1709.

Upon the Equity reserved, Ld. *King* established the Deeds; held the Plaintiffs to be only intitled to the Surplus, *after* the Trusts in the Deeds were performed; and decreed the proper Accounts against the Defendants, of the Money they had received, in Order to find out that Surplus.

Many very obvious Observations occur upon this Case.

Sir *Joseph Jekyll* was so struck with the Objections of Fraud from Preference, that He set aside the Deeds, with Costs.

Ld. *King* reversed his Decree: because no Deed made by a Trader can be fraudulent in *Chancery*, which is not fraudulent in a Court of *Law*, and an *Act* of Bankruptcy. Therefore He directed an *Issue*.

There might be many Reasons, *why* it was *not found fraudulent* upon the Trial. The Deed was executed the 8th of *June*, of *specific* Goods; and was *immediately carried into Execution*. The *Act* of Bankruptcy was not till the 11th of *February* following: And I see no Suggestion that in *June*, *Leigh* thought of committing an *Act* of Bankruptcy. Besides, one Gound upon which the Assignee brought his Bill, was “ Fraud and Imposition upon the *Bankrupt himself*, in obtaining the Deeds:” Therefore, most probably, he was frightened into giving this Security, by Threats of *legal* Diligence against him.

The Case of *Small v. Oudley* was determined very soon after; *viz.* upon the 4th of *December* 1727. The best Report of it, is in 2d. *P. Wms.* 427: But it is no where fully stated. I have a Copy of the Decree from the Register’s Book; as follows—

On the 21st of *September* 1720, *Small*, (to accommodate *Daniel* and *Joseph Nercott*, Brothers, Goldsmiths and Partners, upon a pressing Occasion,) transferred to them 500 *l. S. S.* Stock; upon their engaging “ to transfer to him the like Sum in the *S. S.* Stock “ in a Week or ten Days at farthest,” and giving a Note for that Purpose.

They sold the *S. S.* Stock for 1800 *l.*

On the 29th of *September* 1720, they made the Assignment of *their Share in a Wine-Partnership* with *Oudley*, carried on solely in
his

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* P. 481. * *his Name*, (in which, they had two Thirds, and *Oudley* One Third;) as a *Security for transferring* 500 l. S. S. Stock; and reciting the Truth of the Case.

They, at the *same Time*, assigned two *Lease-hold* Estates to *Small* for the same Purpose

Their Interest in the Wine Trade was *but* 300 l. And *Oudley* had a Right to carry on the Trade till *Christmas* 1723. The Bill, (which was against *Oudly*, and against the Assignee under a Commission issued against the *Nercotts*,) was not brought by *Small*, till after that Time: But an Issue had been directed in another Cause, to try "Whether the said *Nercotts* were Bankrupts at the Time they executed an Assignment to *Small* of a Lease of certain Houses, " on the *said* 29th of *September* 1720."

The above Facts are admitted by the Answers; *no Fraud* is suggested; and they do not mention any Desire to have the *Time* of the Bankruptcy tried over again.

* pa. 429. to 431. Sir *Joseph Jekyll*, in 2 *Peere Wms.* * gives strong Reasons *against* the Decree He thought Himself *bound* to make, because *Ld. King* had just established, "That a Deed by a Bankrupt could not be " set aside, as fraudulent in Chancery."

This Case too was *very particular*. The Fraud was upon *Small*; and not upon the Creditors: His Stock was to be replaced, in a Week, or ten Days *at farthest*, by the original Agreement. 1800 l. of *Small's Money*, went to the Creditors: And this Security amounted *but* to about 300 l. So that the whole Transaction was *beneficial* to the Bankrupt's Creditors. The S. S. Stock was got from *Small*, with a View to *save* the *Nercotts* from breaking. The Security was given, at the *very time* they were *obliged to replace* the 500 l. S. S. Stock: and there was no Pretence that *Small* afterwards permitted them to *continue* one Moment in *Possession*.

* Stephen and Morley Unwin, against Oliver et al, Assignees of Martin Unwin, a Bankrupt: Easter Term 1739.

The Case of *Unwin v. Oliver*, * T. 12 G. 2. is not entered in the Register's Book: But I have seen a fuller Note of it, than was cited at the Bar.

It was an Assignment of several Debts mentioned in a Schedule; to indemnify his Sureties in a Recognizance. *Martin Unwin* had been appointed Receiver of a Lunatic's Estate: And the Plaintiffs became his Securities, by Recognizance, "that He should account " for what He should receive under the Orders of the Court." Two Years after, *Martin Unwin*, by Deed reciting "that 604 l. was " due from Him to the Lunatic's Estate," assigned to the Plaintiff's several

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* several Debts mentioned in a Schedule annexed to the Assignment; * P. 482.
To discharge the 604 l. and to indemnify them against this Security which they had entered into for Him. A Month after this Assignment, *Martin Unwin* became a Bankrupt.

The Act of Bankruptcy was admitted to be a *Month* after the Assignment. No Question was made upon the Clause in the 21 *Ja. I. c. 19*. And there was no Suggestion, “that the immediate Prospect of a certain Bankruptcy was the Cause of the Assignment.”

Lord HARDWICKE held that it could not be set aside as fraudulent, *in Chancery*; unless it was fraudulent in a *Court of Law* and an Act of Bankruptcy. And He held “that *Indemnity* was a “good Consideration:” Of which, there can be no doubt.

But 2dly. (to consider this Transaction, in respect of the *Means*) Suppose a Bankrupt could, after a Resolution to commit an Act of Bankruptcy, prefer one of his Creditors, by an Assignment of *All*; (which We think He cannot;) Yet in *this* Case, the MEANS to attain such Preference were *fraudulent*. A *false Credit* is industriously given the Bankrupt, upon a *secret Trust* “to deliver Possession *so as* “to avoid the Clause in the 21 *Ja. I. c. 19*.”

The second Argument of Fraud in *Twyne's Case*, * is—“The * 3 Co. 81. a.
“Donor continued in Possession, and used them as his own; and by
“Means thereof, traded with others, and deceived and defrauded
“them.”

BUT, three Cases have been cited to shew, “That upon a Mortgage of Goods by a Trader, the Leaving Possession does not infer Fraud; though it may, upon an *absolute Sale*. These are the Cases of *Meggott v. Mills et al'*, 1 *Ld. Raym.* 286; *Bucknal et al' v. Roiston*, in *Precedents in Chancery* 285; and *Ryal v. Rowls*, in *Chancery*, 27th January 1749.

The first is a direct Authority to the contrary. For *Ld. Ch. J. Holt* says, “If these Goods of *Wilson's* had been assigned to any “other Creditor, the Keeping of the Possession of them had made “the Bill of Sale fraudulent, as to the other Creditors.” But He very justly distinguished that Case; and seems to have considered the Landlord (who lent his Tenant Money to buy the Goods, to furnish his House,) as the original Owner of the Goods.

Bucknal et al' v. Roiston was not a Case of Bankruptcy, but upon the Course of Administration of Assets, (where secret Liens give
6 C Priority :)

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* P. 483. * Priority;) and is *expressly* * distinguished, by my Lord Chancellor, from the Case of a *Bankrupt*. Besides, the Possession was there a Trust under an Authority to negotiate and sell; and could not be meant to give any *false Credit*.

Chancellor admits, "that in Case of a Bankrupt, such Keeping Possession would make the Sale void, against his Creditors."

In the Case of *Ryal v. Rows*, the Act of Bankruptcy upon which the Commission proceeded, was *long after* the Mortgages; the Assignees *did not wish* to carry it farther back; and therefore *never objected* "that the Bankrupt's keeping Possession made the Mortgages fraudulent:" But if they had, in *that* Case the Presumption of Fraud would have been *disproved*. The same Fund was mortgaged six Times over: They All trusted to their Conveyances, (like Mortgages of Land,) as a *Title*, without Possession; though a Bankruptcy should happen. They *mistook* the Law; but did not *evade* it.

Whereas here, the Parties manifestly were *aware* "that Possession was *necessary*:" The solemn Determination in the Case of *Ryal v. Rows* had made that Point *notorious*. Possession was here left, upon a *secret Trust* "to deliver it *so as to avoid* the Clause in "21 *Ja. 1. c. 19.*" Which, in *Fact*, was accordingly *done*.

Objections— Two General Objections, from Inconvenience, have been urged: Which deserve an Answer.

1st Objection. 1st. That it will *hurt Credit*, if Traders may not raise Money by mortgaging their Goods without quitting Possession.

Answer. The Policy of the Bankrupt Law introduced by 21 *Ja. 1. c. 19.* and followed ever since, is to *level* All Creditors, who have not actually recovered Satisfaction, or got hold of a Pledge which the Bankrupt could not defeat.

A Trader is trusted upon his Character, and *visible* Commerce: That *Credit* enables him to acquire Wealth. If by *secret Liens*, a few might swallow up All; It would greatly *damp that Credit*.

If he mortgages and *parts with the Possession* of Goods, the World has *Notice*: But, to give Priority from mortgaging Goods, of which the Trader is allowed to act and appear *as the Owner*, would be enabling him to *impose* upon Mankind; and draw them in by *false Appearances*.

No Injustice is done to such Mortgagee; because he really trusts only to the *general Credit* of the Trader: The Conveyance is not a Fraud against *him*, but against his *other Creditors*.

Mortgages

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* Mortgages of *Land* are checked by the *Title*: But where Possession is not delivered, *Goods* may be mortgaged a hundred Times over, and open a plentiful Source of *Deceit*. * P. 484.

The other General Objection from Inconvenience was, "That 2d Objection
" a fraudulent Deed is an Act of Bankruptcy, upon the Face of it ;
" and *can never be purged*."

I am sorry the Phrase has crept into Use: Because it *confounds* the Idea which ought to be annexed to it.

Every equivocal Fact may be *explained by Circumstances*. If a Trader orders himself to be *denied*, Circumstances may shew, that he did not do it *to avoid Payment*; but on Account of Sickness, or particular Business. So if he *leaves his House*, Circumstances may shew, it was not *to abscond*.

Of all the equivocal Facts which can amount to Acts of Bankruptcy, *Deeds* are the most open to be explained by a Variety of Circumstances. Hardly any Deed is fraudulent upon the mere *Face* of it. It is a *good* Sale, if the Consideration be true; *fraudulent*, if false; *Good*, if Possession immediately follows; *bad*, if it do not: Nay, the *not Taking Possession*, being *only Evidence* of Fraud, may be *explained*.

The *Use* to which a Deed is applied, shews *quo animo* it was made. Leaving Possession till after the Act of Bankruptcy, in the Case of *Ryal v. Rowls*, shewed there was *no* Fraud; and that they trusted to the Conveyance.

In *this* Case, the Consultation and Delivery of Possession upon the 11th of *November*, *proves the secret Trust*, in Confidence of which, the false Credit was given the Bankrupt before: It shews that Evading the Clause in 21 *Ja. 1. c. 19.* was in the *View* and *Contemplation* of the Parties. There was *no other Reason* for delivering Possession on the 11th of *November*: Because no Default had happened, which gave *De Mattos* more Pretence to enter *then*, than *before*.

Under all the Circumstances, We are of Opinion That this Conveyance of the Bankrupt's *whole* Substance to *De Mattos*, though by way of Security, and for valuable Consideration, is *fraudulent* and an *Act of Bankruptcy*.

The Determination *here*, is upon the Assignment of *ALL*.

Per Cur. The *Poslea* must be indorsed, "That *Richard Slader* became Bankrupt on the 23d OF OCTOBER."
Rex

Hilary Term 31 Geo. 2.

* P. 485.

* Rex *vers.* Wakefield et al'.

Wednesday, 8
February
1758.

MR. *Harrison* had obtained a Rule, in *Michaelmas* Term 1755. to shew Cause Why an Order of two Justices, made upon *several Quakers*, (for Payment of Tithes under the Value of Ten Pounds to the Curate of a Chapel) and confirmed at the Sessions, upon an Appeal from it, should not be quashed; together with the Order of Sessions confirming it. See 7, 8 *W. 3. c. 34.* and 1 *G. 1. St. 2. c. 6. §. 2.*

Mr. *Norton*, in *Michaelmas* Term last (*viz.* on 26th November 1757,) shewed Cause. He gave up the Order of Sessions, as not maintainable; But defended the *Original* Order.

To this Original Order, Mr. *Harrison* had taken 4 Exceptions: Which were now supported by him and Mr. *Clayton*. These Exceptions were as follow.

1. It is a *joint* Order made on DIFFERENT *Persons*, for *distinct* Non-Payments of *different Tithes*: Whereas there ought to have been a *distinct* Order on EACH. In 1 *Strange* 471. *Between the Parishes of Chewton and Compton-Martin*, the Removal of two different Families of Paupers by One Order, was holden bad; Though the Parishes were the same.

2d. The TITLE is in *Question*: Therefore the Justices have no *Jurisdiction*. The Exception in the Act of 1 *Geo. 1. Stat. 2. c. 6. § 2.* is "Unless the *Titles* of such Dues Tithes or Payments shall be "in Question." And these Words "Unless &c." extend to this *whole* Clause; and are not confined to the granting a *Certiorari* only. And this Fact, of the Title being in question appeared, as Mr. *Harrison* alledged, upon the Granting the *Certiorari*, in the present Case.

3d. *Non constat* that the two Justices who made this Original Order, are "neither PATRONS nor INTERESTED in the Tithes." But 1 *G. 1. c. 6. § 2.* requires that they shall be neither One nor the Other. Now they ought *expressly* to AVER and *shew* (negatively) "that they *are not*:" Or else they have no Jurisdiction, by the very Words of the Act; The Jurisdiction being given to "Any two or more Justices &c. OTHER *than* such as &c."

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* 4th. It does *not sufficiently ascertain and state* WHAT is due and payable by the Defendants; or at least, * FOR *what*, the respective Sums are due. † One Sum is “1 s. 6 d. being *due to the Curate*,” not saying FOR *what*. Another is, “being the *Value* of their ancient customary Payments”. Another is—“4 s. being *antient customary Payments*.”

* P. 486.

* V. 7, 8 W.

3. c. 34. § 4.

N. B. The

Act does not

require the

latter.

† This Objec-

tion is not

supported by

the Act.

This Order was made on the Act of 1 G. 1. Stat. 2. c. 6. § 2. which extends the 7, 8 W. 3. c. 34. § 4, to ALL Payments to Ministers or Curates officiating in Churches or Chapels. (V. that Statute of 7, 8 W. 3. c. 34. § 4: which extends *only* to *Tithes* and *Church-Rates*.)

Mr. Norton *contra* answered these Objections. The Substance of his Defence against them was fully sufficient, if true: For He denied the 1st, to be *material*; And denied the three last, to be well founded.

The Matter was adjourned to *Monday 28th November*.

Then, this Motion being mentioned again,—

The COURT inquired “Whether the Return of the *Certiorari* “ was filed.”

And Lord MANSFIELD said He had called for, and read the Affidavits made for obtaining the *Certiorari*, and upon the shewing Cause.

Mr. Just. DENISON mentioned a Case of *Rex v. Furnes, B. R. H. 6 Geo. 1*, upon a *Certiorari* to remove an Order made upon the Act of 7, 8 W. 3. c. 6, for Payment of small Tithes: Where Ld. Ch. J. PRATT thought that where the RIGHT *was in question*, such Cases were *never intended to be* the Subject of that Act of Parliament. He said, this was only spoken from a Note, which He had seen: But it should seem to be right * and true; and the rather, from a Case of *Rex, v. Furness* being mentioned in 1 *Strange* 264. where an Order for Non-Payment of small Tithes made on 7, 8 W. 3. c. 6, was quashed.

* It is right

and true: At

least, I have a

MS. Note of

the same Case

to the same

Effect, or

stronger; (For

mine says

“ *Per Cur.*

The Design

of the Statute

was only to

give a speedy

Remedy for

small Tithes

where the

Right is a-

greed.”)

Adjourned to the present Term.

Lord MANSFIELD now delivered the Opinion of the Court.

He begun with stating the two Acts of 7, 8 W. 3. c. 34, (§ 4,) and 1 G. 1. Stat. 2. c. 6, (§ 2,) The former relates only to great and small *Tithes* and *Church-Rates*; and is temporary. The latter makes it perpetual and extends it to “*any Tithes or Rates, or any*

6 D

“ Customary

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* P. 487. “ * Customary or other *Rights Dues* or *Payments* belonging to any
“ Church or Chapel, which, of Right, by Law and Custom ought
“ to be paid, for the Stipend or Maintenance of any Minister or
“ Curate officiating in any Church or Chapel.” And Both Acts
direct “ that the Proceedings shall not be removed into any other
“ Court, *unless the Title* shall be in Question.”

It is upon the *last* Act, that the present Order was made.

A *Certiorari* has issued, to remove the Order into this Court ;
And it came on, upon Exceptions to the Order. Both Sides made
very material Objections,—One Side, to the Order ; for that the
Justices had no Jurisdiction, *because the Title was* in Question :
The Other, to the *Certiorari* ; for that no *Certiorari* could issue,
by the express Provision of the Act, to remove the Proceedings from
before the Justices into any other Court, because the Title was not
in question.

The Act was made in *Favour* to, and for the *Ease* and *Benefit*
of QUAKERS ; and to save them from troublesome and expensive
Prosecutions : But it *never meant*, that a *mere Scruple* of theirs, or
an OBSTINATE *With-holding* of the Tithes should be any Hinde-
rance to the Matter's being determined by the Justices of Peace.
This would have frustrated the very Intention of the Act : Which
meant to give this Jurisdiction to the Justices in *that very Case* ;
where the *real Right and Title* to them should not be in Dispute
between the Parties.

Then his Lordship directed the Affidavits on which the *Certi-
orari* was granted to be read.

It was therein sworn on the part of the Defendants, “ That the
“ Defendants *CONTROVERTED the Title* to the Tithes, before the
“ Justices ;” and also, “ That the Title to the Tithes *was then*
“ and *at the Time* of making the said Affidavit, *REALLY in Question.*”

The Justices had Notice to shew Cause against the *Certiorari*.

On shewing such Cause, Five old Inhabitants of the Chapelry
swear by their Affidavit “ That such customary Stipends or Pay-
“ ments *have always been paid* to the Curate by the Land-Holders,
“ *without* any Sort of Scruple or Objection *except* *LATELY* by the
“ *Quakers* :” And no Other Persons dispute it. And these 5 Persons
also swear “ That they believe them *to be due* ; And that the *former*
“ *Owners of these very Lands* (which had been purchased about 4
“ Year ago, by these Quakers,) *DID PAY for them*, as other Persons
“ did,

Hilary Term 31 Geo. 2.

* “ did, in the said Chapelry ;” And these Quakers purchased the * P. 488.
Lands *as subject* to such Payments.

—These are the Affidavits *upon which* the *Certiorari* was granted.

Now if this GENERAL *Allegation* “ of the Quakers *Controverting* “ *the Title,*” and the *consequential Assertion* “ that the Title *was* “ *in QUESTION,*” (without any further Particulars, or shewing at all *upon what* Foot they controverted the Payment) should be esteemed a sufficient Ground for removing the Orders, It would put a *total End* to these Acts of Parliament, and *evade* the very Design and Intention of making them.

For the Quakers might pretend that they are obliged in Conscience to refuse or controvert the Payment of these Demands; and consequently, to question and deny the Right to receive them. Now that is the *very thing* the Acts mean to provide a summary Remedy for. The Intention was, that in *such* Case, the Justices should make an Order to *compel* them to pay.

Their Affidavits are general, “ That they controverted the Title ; and that it was really in question.”

Whereas by the Affidavits made by the 5 old Inhabitants, it is very plain that the *former Owners* of these very Lands have *always paid*; and that these Quakers, who are the subject of this Order, have *no Pretence* to dispute it, upon any other Foot than their own *general Scruple* to pay any Demands of this Nature : Which these Acts are, for their *own Ease and Advantage*, calculated to *compel* them to do, in a Method the most *gentle* and *convenient* for *themselves* (who scruple to pay *without Compulsion.*)

We are All of Opinion, as to the Merits of the Case, that the Title is *not so* controverted, or *so* in Question, as that the Justices can be precluded from Jurisdiction, or their Order be regularly and properly removed into any other Court.

And We are All of Opinion That the Rule for the *Certiorari* having been made absolute, and the Return thereto having been filed, ought not now to stand in the Way and prevent our Coming at the Real Justice and Merits of the Case. For if the *Certiorari* issued *improvidé*, We can Order it to be *superseded*; and the *Return* to be taken off the File.

There

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* P. 489. * There have been * several Instances of this— (a) One was where an Order of two Justices was appealed from; and before the Time when the Appeal should in Course have come on at the Sessions, a *Certiorari* was brought to remove the Order: And, because the *Certiorari* was brought before the Time of hearing the Appeal was come, the *Certiorari* was quashed, and the Return taken off the File.

* I suppose He meant the Cases of (a) Rex v. Eliz. Nicholls, Pas. 18 G. 2. B. R. And (b) Rex v. Govers, Pas. 28 G. 2. B. R.

The (b) Other was a *Certiorari* to remove an Indictment from the *Old Bailey*: And it appearing to this Court, that *They* could not give Judgment, but that the *Sessions of Oyer and Terminer* at the *Old Bailey* ought to do it; the like Method was taken, And it was sent back to the Court below, for *them* to pronounce the Judgment.

Therefore, upon this Case, We are All of Opinion That the Writ of *Certiorari* be superseded (*quia improvidè emanavit*;) the Return taken off the File; And the Order remanded.

His Lordship added this Hint, to be observed in future Cases of this Sort; *viz.* That upon All Orders of this Kind, the great and material Point must be “Whether the TITLE to the *Tithes* was REALLY in question, or not;” and ought to be “determined, before the *Certiorari* issues.

Thursday, 9th
February
1758.

Godin et al’ *vers.* London Assurance Company.

THIS was a Point reserved at *Nisi prius*, before Lord Mansfield at Guildhall.

The Question, strongly litigated there, was “Whether the Plaintiff ought to recover his WHOLE Loss, or only HALF;” It being objected “that there was a DOUBLE Insurance.”

A Verdict was found for the *Whole*, subject to the Opinion of the Court: And if the Court should think, upon his Lordship’s Report, “that the Plaintiff, by Law, ought to recover for *Half* his “Loss only,” then the Verdict to be entered up as for *Half*.

* P. 490. * It was argued, Yesterday, by several Counsel on each Side: And, this Day.

Lord MANSFIELD delivered the Opinion of the Court.

He begun with stating the Facts, as they appeared to Him at the Trial: Which were These—

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Mr. *Meybohm*, of *St. Petersburg*, had Dealings with Mr. *Amyand* and Company, of *London*; Who often sent Ships from *London*, to Mr. *Meybohm* at *St. Petersburg*.

Meybohm, as appeared by the Evidence, was indebted, on the Balance of their Accounts, to *Amyand* and Company.

Amyand and Company sent a Ship, called the *Galloway*, *Stephen Baker* Master, to Mr. *Meybohm* at *St. Petersburg*, to fetch certain Goods.

Meybohm sent the Goods; and promised to send the Bill of Lading by the next Post, but never did.

Afterwards, viz. in *August* 1756, *Amyand* and Company got a Policy of Insurance from private Insurers, for 1100 *l.* on the Ship, Tackle and Goods, at and from *London* to *St. Petersburg*, and at and from thence back again to *London*; which Policy was signed by several private Underwriters, quite different Persons from the present Defendants: And of this Sum of 1100 *l.* thus underwritten, 500 *l.* was declared to be on $\frac{1}{2}$ Parts of the Ship; And the remaining 600 *l.* to be on Goods,

Between 26th *August* and 28th *September* 1756, (Both included,) Mr. *Amyand* insured 800 *l.* more, with other private Insurers: And this latter Insurance was upon Goods only; and was only at and from *St. Petersburg* to *London*.

On 28th, 29th and 30th of *October* 1756, Mr. *Amyand* insured 900 *l.* more, with other private Insurers: Which last Insurance was on Goods only, at and from the SOUND to *London*.

So that the whole Sum thus insured by *Amyand* and Company, was 2800 *l.* Of which 2800 *l.* the Sum of 2300 *l.* was on Goods; the remaining 500 *l.* was on the Ship.

Several Letters being given in Evidence, It appeared that *Meybohm* wrote from *Petersburgh*, on 7th *September* 1756, (the Date of his first Letter on this Subject,) to *Amyand* and Company; and mentioned what Goods He should send to them, referring to the In-
* voice for the Particulars; and directed them to get Insurance thereon * P. 491.
and to Place the Goods and the Insurance to a particular Account which he named in his Letter; in which, He also specified some Iron, which was for Mr. *Amyand*'s own Account.

This Letter Mr. *Amyand* afterwards received, (probably, about the 27th of *October* :) And in Consequence of it, made the Insurance
6 E accordingly.

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accordingly, upon the 28th, 29th and 30th of the same *October*, as before mentioned.

Meybohm, having shipped the Goods, *indorsed the Bills of Lading* to One Mr. *John Tameſz* in *Moscow*, (the Plaintiff, in Effect, in the present Action :) Who, on the 7th *October* 1756, wrote to his Correspondent Mr. *Uthboff*, here in *London*, “to insure these Goods.” In this Letter, He desires Mr. *Uthboff* to *insure the whole*, “that He (*Tameſz*) might be *safe in all Events*; For He suspected that these Goods were intended to be consigned by *Meybohm* to some body else, and perhaps *might be insured by some other Persons*.” And He says, they were transferred to Him, in Consideration of his being in Advance to *Meybohm* more than their Amount. This Letter from Mr. *Tameſz*, with these Directions “to insure,” was received by Mr. *Uthboff*, on the 15th of *November* 1756.

Mr. *Uthboff* accordingly applied to the Defendants, the *London Assurance Company*; and *disclosed* to them, at the same Time, All these Particulars: And they, upon the 16th of *November* 1756, AFTER being thus APPRISED “that there might be ANOTHER Insurance,” made the Insurance now in question, for 2316 l. on the Goods, at and from the *SOUND* to *London*. The Goods were lost, in the Voyage.

Mr. *Uthboff*’s Insurance was made by the Plaintiff’s *Godin Guion* and Company, who are Insurance Brokers: And they declare that this Insurance (which is expressed to be made by them, “as well “in their own Names, as for and in the Name and Names of all “and every Other Person or Persons to whom the same doth may “or shall appertain, in Part or in all,”) was made by Order of *Henry Uthboff* Esq. This Declaration is indorsed upon the Policy; and is dated 18th *November* 1756.

There is no Doubt, as to the Value of the Goods, or as to the Loss of them. And it is admitted by the Defendants, “That the Plaintiff ought to recover *Half* the Loss, from *Them*.” But they say, they ought to pay *only Half*, not the *Whole* of the Loss. So that the only Question is.

“Whether the Plaintiff is intitled, upon the Circumstances of this Case, and upon the Facts I have been stating, to recover the
* P. 492. “* *WHOLE* Loss from the present Defendants; Or *only* the *HALF* of his Loss from *Them*, and the Remainder from the Under-Writers of Mr. *Amyand*’s Policy.”

The Verdict is found for the Plaintiff, for the *Whole*: But it is agreed to be subject to the Opinion of this Court, upon the Question I have just mentioned.

First

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First—To consider it, *as between the Insurer and Insured.*

As between them, and upon the Foot of Commutative Justice merely, there is no Colour why the Insurers should not pay the Insured the Whole: For they have received a Premium for the whole Risque.

Before the Introduction of *Wagering Policies*, It was, upon Principles of Convenience, very wisely established, “That a Man “ should *not* recover *more* than He had lost. Insurance was considered as an *Indemnity only*, in Case of a Loss: And therefore the Satisfaction *ought not to exceed* the Loss. This Rule was calculated to prevent Fraud; Lest the Temptation of Gain should occasion unfair and wilful Losses.

If the Insured is to receive *but One* Satisfaction, Natural Justice says that the several Insurers shall All of them *contribute pro rata*, to satisfy that Loss against which they have *All* insured.

No particular Cases are to be found, upon this Head: Or, at least, None have been cited by the Counsel on either Side.

Where a Man makes a *double* Insurance of the *same* Thing, in such a Manner that He can clearly recover, against several Insurers in distinct Policies, a *double* Satisfaction, The Law certainly says “That He *ought not* to recover doubly for the *same* Loss, but be “ content with *One single Satisfaction* for it.” And if the same Man really and for his own proper Account, insures the same Goods doubly, though both Insurances be not made in his own Name, but One or Both of them in the *Name of another Person*, Yet that is just the same Thing: For the *same Person* is to have the *Benefit of both* Policies. And if the *Whole* should be recovered from *One*, He ought to stand in the Place of the Insured, to receive *Contribution* from the Other, who was equally liable to pay the Whole.

The Act of 19 G. 2. c. 37. (made to regulate Insurances, and for Prevention of wagering Policies,) expressly *prohibits* the *Re-assuring*, (after having already insured the same Thing;) *Unless* the former Assurer shall be insolvent, or become a Bankrupt, or die: And it provides * that even in *those* Cases, it shall be *expressed* in the * V. § 4.
* Policy “*to be a Re-Assurance.*” So that, here, if Mr. Tamez had * P. 493.
Himself made a second Assurance upon the same Goods, and was to have had the *Benefit of both* Assurances Himself, it had been within this Act.

But if Tamez was *not* to have the Benefit of both Policies in *all Events*, then it can never be considered as a *double* Policy.

It

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Objection.

It has been said "That the *Indorsment* of the Bills of Lading
" *transferred* MEYBOHM's *Interest* in all Policies by which the
" Cargo assigned was insured; And therefore *Tamesz* has a *Right*
" to Mr. *Amyand's Policy*;" and "that *Tamesz*, being the Assignee
" of *Meybohm*, is the *Cestuy qui Trust* of it, and may recover the
" Money insured;" And even "that He may bring *Trover*, or
" *Detinue*, for the very Policy itself:" And it is urged from hence,
" That He either will or *may* have a *double* Satisfaction for the
" *same Loss*."

Answer,—

But, allowing "that by the Indorsement of the Bills of Lading
" and Assigning the Cargo to *Tamesz*, He stands in the *Place* of
" MEYBOHM in respect of *his* Insurances;" Yet Mr. *Amyand* has
an Interest of his *own*, and had actually insured the Ship and Goods,
and the Sum of 1900*l.* (upon both together,) *prior* to any Direc-
tions or Intimation received from Mr. *Meybohm*, "to insure for
" HIM." *Various People* may insure VARIOUS INTERESTS, on
the same Bottom: (As one Person, for Goods; another, for Bot-
tomree, &c.) And here, Mr. *Amyand* had an Interest of *his own*,
distinct from the Interest of *Meybohm*: He had a *Lien upon these*
very Goods, as a Factor to whom a Balance was due. And He
had the *sole* Interest in the *Ship*: Which was a Part of the Things
insured by Him. It is far from appearing, "that even his *last* In-
" surance (in *October*) was made on the Account of *Meybohm*, or
" as Agent for Him." So far from it, Mr. *Amyand* insists upon it
for his *own Benefit*, (as He expressly declared at the Trial,) and ab-
solutely *refuses to give it up* or to suffer his *Name* to be used by the
Plaintiff; though He was a Witness for the Defendants, and was
produced by them, and inclined to serve them. So that the *Founda-*
tion of this Argument, urged by the Defendant's Counsel, *fails*
them; And there is, in Reality, *Nothing to support it*.

But even supposing "that Mr. *Amyand* had made his Insurance,
" not upon his own Account, but *as Agent or Factor* for Mr. *Mey-*
" *bohm*, and upon the *Account of Meybohm*;" Yet, *even then*, *Ta-*
mesz can *never* come against *Amyand's* Underwriters, or come at
Amyand's Policy, to his own Use. For Mr. *Amyand*, the Factor
for *Meybohm*, has *Possession* of the Policy, and appears to have been
a *Creditor* of *Meybohm's* upon the Balance of Accounts between them
* P. 494. * at the Time when He made the Insurance: And I take it to be
now a settled Point, "that a FACTOR, *to whom a Balance is due*,
" has a LIEN *upon all Goods of his Principal, so long as they re-*
" *main in his Possession*." *Kruzer et al. v. Wilcox et al.* was a Case
in Chancery upon this Head. It came on first, * before Sir *John*
Strange then Master of the Rolls: Who decreed an Account; and
directed Allowances to be made for what the Factor had expended
on

* 12th March
1754.

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on Account of the Ship or Cargo; and reserved All further Directions, till after the Master's Report. It came on again, afterwards, for further Directions, after the Master's Report, before the Lord Chancellor; who was attended by four eminent Merchants, who were interrogated by Him publickly. After which, He took Time to consider of it; And on 1st February 1755, decreed "that the Factor has a *Lien* on Goods consigned to Him; not only for incident Charges, but as an Item of mutual Account for the general Balance due to Him, so long as he retains the Possession. But if he parts with the Possession of the Goods, He parts with his Lien; because it can not then be retained as an Item for the general Account." And there was another Case, in the same Court, of *Gardiner v. Coleman*, a few † Months after; in which, the former Case, † 2d June determined as I have mentioned, was considered as a Point settled; 1755. And this latter Case, of *Gardiner v. Coleman*, was decreed agreeably to it. So that Mr. Amyand, even considered as Factor or Agent to *Meybohm*, and as making the Insurance upon *Meybohm's* Account, is yet intitled to retain the Policy; *Meybohm* being indebted to Him upon the Balance of the Account between them: And He has a Lien upon the Policy, whilst it continues in his Possession. Therefore, even in this View of the Case, Mr. Tamesz must first have paid to Mr. Amyand the Balance of his (*Amyand's*) Account, before he could have gotten that Policy out of Mr. Amyand's Hands: And consequently, Mr. Tamesz was very far from being intitled to the Benefit of it, as a *Cestuy qui trust*, absolutely and entirely.

But if the Question "Whether Tamesz could take Benefit of Mr. Amyand's Policy," were doubtful; Yet, here, Tamesz insured the Goods with the Defendants, expressly under the Declaration of his Suspicion "that there might have been a former Consignation, and some former Insurance made upon the Goods by some other Person;" But He desired to insure the Whole, for his own Security; And to this, the Defendants agreed; and took the whole Premium. Mr. Amyand insisted upon his Right to the whole Benefit of his own Policy, when He was examined as a Witness; and is now litigating it in Chancery. It would neither be just nor reasonable, that Tamesz should only recover Half of his Loss from the Defendants, and be turned round, for the other Half, to the uncertain Event of a long and expensive Litigation. I do not believe there ever will or can be any Recovery by Tamesz or those who shall stand in his Place, * against Amyand's Underwriters. However, if those Underwriters * P. 495. are liable to contribute at all, the Contribution ought to be amongst the several Insurers themselves: But Tamesz, the Insured, has a Right to recover his WHOLE Loss from the Defendants, upon the Policy now in Question, by which They are bound to pay the Whole. For though here be two Insurances, yet it is not a DOUBLE Insurance: To call it so, is only confounding Terms. If Tamesz could recover

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against *both* Sets of Insurers, Yet He certainly could not recover against the Underwriters of *Amyand's* Policy, *without* some *Expende*; nor *without* also first paying and reimbursing to Mr. *Amyand* the *Premium* He paid, and also his *Charges*. This is by no Means within the *Idea* of a DOUBLE Insurance. Two Persons may insure two *different Interests*; Each, to the whole Value; As the Master, for Wages; the Owner, for Freight &c. But a DOUBLE insurance is where the *same* Man is to receive *two Sums instead of One*, or the *same* Sum *twice over*, for the *same Loss*, by reason of his having made two Insurances upon the *same* Goods or the *same* Ship. Mr. *Tamefsz* is intitled to receive the whole from the Defendants, upon *their* Policy; whatever shall become of Mr. *Amyand's* Policy: And *They* will have a Right, in case He *can* claim any Thing under Mr. *Amyand's* Policy, to *stand in his Place*, for a *Contribution* to be paid by the other Underwriters to *THEM*. But still *They* are certainly obliged to pay the *Whole* to *HIM*.

Therefore, upon these Grounds and Principles, in *every Light* in which the Case can be put, We are All of Us clearly of Opinion, “ That the Verdict is right, as it now stands, for the *WHOLE*; “ And that the

“ *POSTEA* be delivered to the PLAINTIFF.”
RULE accord.

Rex *vers.* Inhabitants of Bishop's *Hatfield*.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 141. pa. 439.

* P. 497.

Saturday,
11th Feb.
1758.

* Rossell *qui tam* &c. *vers.* Kitchen.

ON Thursday 26th January last, Mr. *Whitaker* moved in Arrest of Judgment, after a Verdict for the Plaintiff in a *qui tam* Action upon the Statute of 1 Ja. I. c. 22. (“ the Duty of Tanners, Curriers, Shoemakers, and of OTHERS cutting of Leather.”) A Rule was then made “ to bring in the *Postea*.” And the *Postea* being now brought in, Mr. *Whitaker* and Mr. *Nares* objected—

1st.

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1st. That the Defendant is *not an Object* of this Act.

It is not alledged in the Declaration "that the Defendant was a Tanner, Currier, Shoemaker or other Person occupied in the cutting of Leather:" Which the Preamble shews that he ought to be. *Cro Car.* 587, *Lodge v. Hollowell*, is an Action brought upon another Clause of this Act: And there it is alledged "that the Defendant was a Currier &c." * *Brown's Entries*, on the Act against buying and selling live Cattle—The Defendant is here alledged to be a Butcher. †

They relied upon the Preamble of the Act, rather than the enacting Part; and argued that *Both* must be taken together.

* 2d. Objection—This Action is brought upon a Supposition, and under an Allegation, "that a Third Part of the Penalty belongs to the Dean and Chapter of Westminster, as Lords of the Liberty where the OFFENCE was committed." Whereas by the Act of Parliament this third Part of the Penalty must belong to the City of London, when the Offence is committed WITHIN THREE MILES of the City: Although the Place where the Offence was committed, be NOT, in any other Respect, situated within the said City or its Liberties.

For the 50th Section of this Act gives to the Mayor of London, a JURISDICTION extending to ALL Places * within 3 Miles of that City: And at the same time, EXCLUDES All others in general, and all the other Jurisdictions thereby established in particular, from having ANY Jurisdiction at all, within three Miles of the said City. So that if the City of London have not Jurisdiction in ALL Places within three Miles of the City, they have none AT ALL given them under this Act of Parliament.

Now Drury Lane, appears and was proved to be the Place WHERE the present Offence was committed: Which is clearly within three Miles of the City of London; and therefore is within the Jurisdiction given to the City by this Clause, although it is indeed actually situated within the Liberty of the Church of Westminster. And consequently, the Penalty belongs to the City of London; and not to the Church of Westminster.

[Vide § 46. which gives the Penalty; viz. $\frac{1}{3}$ to the King; $\frac{1}{3}$ to the Prosecutor; and $\frac{1}{3}$ to the City, Borough, Town, or Lord or Lords of Liberties where the Offence shall be committed or done.] They cited 1 *Lutw.* 138 under this second Objection.

* The Words there are—
"that the Defendant,
"being a
"Currier &c"
† But N. B.
Here the Words of § 38. are, "that every Person."

* P. 498.

* V. ante pa. 389, 390.
Rex v. Goddard Williams.

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3d. Objection. It follows, "that the *Venue* is wrong;" it being *laid in Middlesex*.

Mr. *Norton contra* for the Plaintiff, was going to answer the Objections: But was prevented by

LORD MANSFIELD.

1st. The Act is *not confined* to particular Sorts of Leather, nor to particular Persons: It *extends to ALL red* Leather; and to EVERY Person. The *Preamble* indeed is *general*, and does *not* mean or intend to specify and enumerate every *particular* Case. But what the Legislature had in View, in the making this Act, was "to *secure* " *the STAPLE* of Leather, by this Search &c."

* P. 499. * And all the *other* Clauses of this Act are general; and are NOT *confin'd* to "Persons occupied in the Trade or Business of *cutting* " *Leather*." This would not have remedied the Evil; or answered the *End* of the Act: For the Evil is just the same, if any *other* Persons commit this Offence.

2dly. The EXTENSION *of the* JURISDICTION of the City of *London*, undoubtedly, can NOT ALTER *the* LOCALITY of the Place *where* the Offence is committed. All that the Act does, is enlarging the *Jurisdiction* of the City of *London*. Besides, the Act gives *particular* Penalties for particular Offences: And this Penalty, in the 46th Section, is given " $\frac{1}{3}$ to the King; $\frac{1}{3}$ to him or them that " shall first sue &c; And $\frac{1}{3}$ to the City Borough, Town, or Lord or " Lords of Liberties, WHERE the Offence shall be *committed or done*."

He concluded with saying that it was an excessively plain Case.

In which Opinion

The Three JUDGES concurring, a RULE was made,
" That the *Postea* be delivered to the PLAINTIFF."

Monday, 13
Feb. 1758.

Rex *vers.* Inhabitants of *Austrey*.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT CASES, N^o. 142. p. 441.

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Rex *vers.* Inhabitants of Cold Ashton.

* P. 502.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 143. pa. 444.

Rex *vers.* Martha Gray.

* P. 510.

THE Defendant stood indicted of a Nuisance in stopping up a Foot-Way leading through *Richmond-Park*.

* The present Question was only, Whether the Trial (for which * P. 511. Notice had been regularly given by the Prosecutors, “to try it at “the next *Surry-Affizes*,”) should be put off, or not.

The Cause alledged for putting it off, by the Counsel for the Defendant, (who professed themselves to be Counsel, in this particular Case, for the Crown,) was That there had been a LIBEL *published* relative to the Question in Issue, *with Intention to influence* the Publick and the *Jury* who should try the Cause.

The Fact was, That when the Cause came on to be tried at the *last* Summer Affizes; before Lord *Mansfield*, this Libel (just then published and distributed,) was produced in Court, and complained of in Court, as calculated to instruct the Witnesses and influence the Jury.

Two of the *Principal Prosecutors*, then in Court, were by Affidavit charged with having *procured* the said Libel to be written published and distributed. It purported, in the Title-Page, to be printed for and published by *Shepherd*, the Brother of a Principal Prosecutor: And an Affidavit was read, proving Him the Publisher, And that the Copy produced was bought from Him in his Shop, and that He said, “Great Numbers had been sent to the *Surry-Affizes*.”

The next Day *One* of the said Prosecutors *only* made an Affidavit to deny the Charge; but in *such a Manner* that it rather fixed it, as much as the Silence of the Other did.

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The Counsel for the Prosecution, as it did not appear to *what* Witnesses or Jurors the Pamphlet had been conveyed, apprehending that such Practices were not only a Contempt of the Court and high Misdemeanor, but might invalidate any Verdict obtained before a proper Inquiry could be made into the Matter, desired that the Trial might be postponed.

Which was consented to, by the Counsel for the Defendant: And an Order was accordingly made, upon the Motion of one Side, consented to by the Other.

Informations were afterwards moved for, and granted, against Some of the Persons concerned in Printing and Publishing the said Pamphlet; and were ready for Trial at the Sittings after this Term, in *Middlesex* and *London*.

* P. 512. * Mr. Attorney-General and the other Counsel for the Crown, moved, a few Days ago, to put off the intended Trial of the *Indictment against* the Defendant GRAY, TILL AFTER *the Trial of this* Information which had been filed *against the Publishers of this Libel*; or at least to the next following Assizes to these now approaching *Lent-Assizes*; To the End that the Publishers of this Libel might be tried in the *Interim*, and receive Judgment, (if convicted :) Which, they said, would *take off* the improper Influence which the Publication of it had occasioned.

Which Motion being strongly opposed by the Counsel for the Prosecution; The Court took Time, till this Day, to advise.

And now Lord MANSFIELD delivered his own and Mr. Just. DENISON's and Mr. Just. WILMOT's Opinions, (for He said He did not know Mr. Just. FOSTER's, who had just sent Him a Letter to inform Him "That He could not be here to Day;") which Opinion was, in short, (though He gave it very much at large,) That the Trial of these Informations for Publishing the Libel, was NOT *so connected with* the Merits of the Question to be tried upon the Indictment, (which was a mere Question of *Civil Right*, though in the Form of a Criminal Prosecution,) as that the Trial of the *Civil Right* ought to be stayed till the Determination of the Information against these Publishers of the Libel.

At the Assizes, The Counsel for the Prosecution desired the Trial might be put off: Which was consented to, on the Part of the Defendant. If they had not, I should have adjourned it Myself. But there is not the same Reason now. For at *that* Time, it appeared

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peared that One, if not Two of the principal Prosecutors attending the Assizes, had been industrious in dispersing and sending it about, to the Witnesses and Jury, for very unjustifiable Purposes. But now * One of these principal Prosecutors chiefly concerned in it, is * Shephard. dead, and was so even before the Motion for the Information; the † Other is NOT *now under the Charge* of being concerned, (what- † Lewis. ever *Suspicion* may remain upon him :) And the *only* Persons fixed upon by the Affidavits, now actually under the Charge, are *mere Pamphlet-Sellers and Publishers*, of whom they were bought. And He could not, He said, upon the best Consideration that he could give it, at all discover or conceive how the Conviction or Acquittal of *them* of the mere *Fact of Publication of this Libel*, could ANY WAY *affect* the Merits of the Question concerning the *Civil Right*; or how the Trial of the Point upon the *Civil Right* could be at all altered, by being brought on before, or after the Event of the Criminal Trial for publishing the Libel.

* Indeed, *if that had been* the Case, As suppose there had been an * P. 513. Information against the Principal Prosecutors of this Indictment for the Nuisance, for instructing and suborning Witnesses, or for undue Endeavours to influence Jurors, *That* might be a Reason for postponing the Cause till these Charges relative to the Conduct of the Parties were tried. But *that* is not this Case: And whether the Defendants to the Informations were or were not guilty of publishing this Libel, can no way affect the Merits of the Cause, or can any how be given in Evidence.

Therefore the RULE must be DISCHARGED.

Rex *vers.* Inhabitants of Mayfield.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 144. pa. 513.

Fairley

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Fairley *vers.* M^cConnell.

MR. *Aston* shewed Cause “why a *Procedendo* should not go, to the *Burrough-Court* of *Portsmouth* :” who insisted on a Right to proceed there, AFTER a *Habeas Corpus cum Causa*.

He, on the contrary, insisted That by the Proviso in § 6. of the 21 *Jac.* 1. c. 23. (“to prevent Suits commenced in inferior Courts, “from being removed into superior, unless &c.”) There ought to have been an *Utter-Barrister* of 3 Years standing, PRESENT at the Trial of the Cause: Whereas no such Person was present at this Trial. For want of which, the Trial, He said, was void; And the *Habeas Corpus* to remove the Cause, was well brought. In Proof of this He cited *Cro. Car.* 79. *Clapham's Case*—(2d Resolution) in Point—“That it is essential that an *Utter-Barrister* of 3 Years “Standing, be present, either as Judge, or Deputy-Judge.” 3 *Mod.* 85. *Anonymous*. A like Resolution proving the Necessity of an *Utter-Barrister's* being present; Or else, that this Act, by Virtue of this Proviso, does not extend to the Case.

Mr. *Yates contra* for the *Procedendo*. This Qualification, of being *Utter-Barrister* of 3 Years standing &c, ONLY extends to the * P. 515. * Case of the Judge or Steward *Himself*; NOT to his *Assistant*. And Mr. *Serj. Stanniford* who is such a *Barrister* as is described in the Proviso, is the *Judge* of the Court. So that the *Proviso* does not extend to the present Case.

Mr. *Aston* in Reply—But *He* was NOT present: The Cause was tried by Mr. *White*, an *Attorney*; who is his Deputy, and is not a *Barrister* at all. And the Defendant relied upon the *Habeas Corpus* to remove the Cause out of this inferior Court; and therefore did not attempt to try the Merits, or make any Defence, there.

N. B. The PROVISIO is, “That this Act (of 21 *Jac.* 1. c. 23.) “shall extend ONLY to SUCH Courts of Record in Cities, Liberties, Towns Corporate, and elsewhere, and for so long “Time only, as there is or shall be an *Utter-Barrister* of 3 “Years Standing at the Bar, of one of the Four Inns of Court, “that is or shall be *Steward*, *Under-Steward* or *Deputy-Steward*, *Town-Clerk*, or *Judge* or *Recorder* of the same inferior “Court; or that is, or shall be from Time to Time *Assistant* “to such Judge or Judges of such inferior Courts as shall not “be *Utter-Barristers* of such Standing, as is aforesaid; AND

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“ THERE PRESENT ; In which, such Actions, Bill, Complaints,
“ Suits or Causes, is or shall be brought, commenced, or de-
“ pending; and *not of Counsel* in any Action, Suit or Cause
“ then depending in the same inferior Court.”

Lord MANSFIELD—The Judge, though He be such a Barrister,
can be of no Use to the Court, unless *He HIMSELF be THERE*.
The Meaning of the Act is, That such an Utter-Barrister ought
in all Events, *to be PRESENT at the Trial*.

Mr. Just. DENISON and Mr. Just. WILMOT—Certainly: *That*
was the Meaning of the Act beyond Doubt. And *for WANT of*
this, the Trial now in question is void.

The RULE (to shew Cause “Why there should not issue a
“ Writ of *Procedendo*, to be directed to the Mayor Aldermen
“ and Burgeses of the Burrough of *Portsmouth* ;” And “Why
“ the Defendant should not pay to the Plaintiff the Costs of
“ this Application ;”) was

DISCHARGED.

* *Rex vers.* Elizabeth Sarmon.

* P. 516.

THE Court made no Sort of Difficulty to *quash an Indictment*-
(though attempted, by two or three Counsel, to be support-
ed) “For that the Defendant *for the Space of FOUR Hours and*
“ *MORE TOGETHER*, on *every* of the several Days specified, (which
“ were the first Day of *January 29 G. 2.* and *divers other Days*
“ and Times between that Day and the Day of taking the Inquisi-
“ tion,) *with Force and Arms &c.* at *London*, at the Parish of *St.*
“ *Martin within Ludgate*, in the Ward of *Farringdon Without*, in
“ *London* aforesaid, unlawfully injuriously and wilfully did SET
“ PLACE and KEEP a *certain* Person, (whose Name was yet un-
“ known to the Jurors,) *in and upon the common and ancient Foot-*
“ *Way* on the North-Side of the *Public-Street* there situate, called
“ *Ludgate-hill* ; TO DELIVER *out certain* PRINTED BILLS OF HER
“ OCCUPATION, to Persons passing that Way ; *which said Person*
“ so set placed and kept there, by her the said *Elizabeth*, did, on
“ the said Days and Times, REMAIN IN AND UPON *the said Com-*
“ *mon Foot-Way* DURING *the several Spaces of Time aforesaid*, DE-
“ LIVERING AND DISTRIBUTING *printed Bills*, as aforesaid ;
“ Whereby *the same Foot-Way*, at those several Days and Times,
“ *was greatly IMPEDED and OBSTUCTED* ; So THAT *the Liege*
“ *Subjects* of our said Lord the King, *there passing and residing,*
“ *could*

6 H

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“ *could NOT SO FREELY go pass and repass in by or through the*
“ *SAME WAY, as they ought and were used to do : To the great*
“ *Damage and common NUSANCE of all the said Subjects, and*
“ *against the Peace of our said Lord the King his Crown and*
“ *Dignity.*”

The Court held this to be a Matter NOT *indictable*; and
quashed the INDICTMENT.

The End of *Hilary* Term 1758. 31 Geo. 2.

Easter

* Easter Term

* P. 517.

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Rex *vers.* Richardson.

Wednesday,
12th April
1758.

THIS was a *General Demurrer*, by the King's Coroner and Attorney, to the Defendant's Plea to an Information in Nature of a *Quo warranto* exhibited against *Thomas Richardson*, to shew by what Authority he claimed to be one of the Portmen of the Town or Burrough of *Ipswich*.

The Plea (in Substance) is, that *Ipswich* is an ancient Burrough by Prescription, prior to the Charter: That at the Time of granting it, there were, and long before had been 12 Burgeses called Portmen. Then it sets forth the Letters Patent of Incorporation, dated 11 Feb. 17 Car. 2. which, after reciting that this Town or Burrough had been, for many Ages, a Corporation &c; first confirms the said Incorporation and all their Liberties Free Customs Franchises &c. Then the said Letters Patent name constitute and confirm the several Officers, and (amongst the rest) twelve Portmen. Then they go on to grant and confirm, "that All *Elections* of the *Portmen* and of every of them, by the Death OR REMOVAL of any of them or otherwise in whatsoever Manner happening, should from thenceforth for ever be made and ought to be made by the OTHERS or RESIDUE of the Portmen for the Time being, or the greater Part of THEM."

Then the Plea sets forth the Acceptance of the Letters Patent by the Corporation, and their conforming thereto, to the Time of the Plea.

The Plea goes on, and alledges a Custom then and still subsisting, "that the Bailiffs Burgeses and Commonalty for the Time being, OR *so many of them as would be present*, have met and assembled and of Right ought to meet and assemble together in the Moot-hall

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* P. 518. “ * *Moot-hall* yearly and every Year, at divers Times in the Year,
“ *viz.* Once, on the 8th of September in every Year, for the Elec-
“ tion of Bailiffs, and for the consulting about and transacting of
“ other lawful and necessary Affairs concerning the Burrough and
“ the good Rule and Government thereof; and *again at Michaelmas*
“ in every Year, for the transacting of divers lawful and necessary
“ Busineses &c; And *also at such OTHER Time and Times* in the
“ Year as to the Bailiffs of the said Town or Burrough for the
“ Time being hath seemed meet and necessary, *upon DUE Notice*
“ being previously given thereof, for the better ordering Regula-
“ tion and Government of the said Town or Burrough: At which
“ said Assembly, from Time to Time had and held as aforesaid,
“ the Bailiffs of the said Town or Burrough for the Time being,
“ during all the Time aforesaid, have of Right presided, and have
“ used and been accustomed and ought to preside; and *which said*
“ *Assembly*, during all the Time last aforesaid, hath been and hath
“ been called the GREAT Court of the said Town or Burrough.”

Then the Plea further sets forth another then and still subsisting Custom and Method of *Electing* swearing and admitting the *Portmen*, whenever any Vacancy or Vacancies hath or have happened by the Death Resignation *Discharge* or *Removal* of any Portman or Portmen of the same Town, or in any wise whatsoever; *viz.* “ that
“ the RESIDUE of the Portmen, or the greater Part of THEM,
“ have within a REASONABLE AND CONVENIENT Time after the
“ happening of such Vacancy or Vacancies, *assembled* in the Coun-
“ cil-Chamber, for the *Election* of another Portman or other Port-
“ men; And, in the said Room there, have elected and named,
“ and of Right ought to elect and name, out of the then Burgesse
“ of the said Town or Burrough then resident and inhabiting
“ within it, such other Person or Persons as the *said then RESIDUE*
“ of the Portmen afore said, or the greatest Part of THEM, have
“ thought fit and proper to be a Portman or Portmen of the said
“ Town, to fill up such Vacancy or Vacancies: And such Person
“ or Persons so elected and named to be a Portman or Portmen of
“ the said Town or Burrough, and being resident and inhabiting in
“ the same Town, hath and have, for all the Time aforesaid, been
“ sworn and admitted, and during all that Time ought of Right
“ to be sworn and admitted into the same Office or Offices; And
“ every Person so elected sworn and admitted &c, and being resi-
“ dent and inhabiting &c, during all the Time aforesaid, hath of
“ Right enjoyed had used and exercised, and during all that Time
“ ought of Right to have Use and Exercise, and still of Right
“ ought to enjoy use have and exercise the said Office of a Port-
“ man of the said Town or Burrough, and all the Liberties Privi-
“ leges Rights and Franchises to that Office belonging and apper-
“ taining, from the Time of his Admission thereto, until the Death
“ Resignation *Discharge* or *Removal* of such Portman.”

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* The Plea further shews, That every Portman of the said Town* P. 519.
or Burrough, during the Time of his being in that Office, ought,
according to the Custom of the said Town or Burrough, to be re-
sident and inhabiting within the same Town or Burrough or the
Liberties thereof; and according to the Custom of the said Town
or Burrough and BY THE DUTY of his Office of Portman, ought to
ATTEND and be PRESENT at every GREAT Court of the said
Town or Burrough held or to be held in the Moot-Hall aforesaid
within the said Town or Burrough, To ADVISE and ASSIST the
Bailiffs of the said Town or Burrough for the Time being, in the
good Rule and Government of the same Town or Burrough.

It then alledges that on the 8th of September 1755, and for six
Months and more next preceding that Day, He the said Thomas Ri-
chardson and one John Gravenor were Bailiffs of the said Town or
Burrough.

That on the same Day and Year, and for the Space of one whole
Year then last past, and upwards, Sir Richard Lloyd Knight, John
Sparrowe, Samuel Kent, Humphrey Rant, Ellis Brand, Michael Thir-
kle the Younger, Goodchild Clarke, William Hammond, George Foster
Tuffnell, and James Wilder were the then Portmen of the said Town
or Burrough.

That within the said Space of that Year during which the said
Sir Richard Lloyd &c. were Portmen as aforesaid, divers Great
Courts of the same Town or Burrough, were holden &c; that is to say,
One Great Court of the said Town or Burrough, was duly holden at
the said Moot-Hall of the said Town, in and for the said Burrough,
on the 13th of January 1755; One other Great Court of the said
Town or Burrough was duly holden at the said Moot-Hall &c, on
the 15th of April 1755; One other, on the 9th of June 1755; And
One other, on the 19th of June 1755; Before the Holding of
which said several Courts respectively, DUE NOTICE had been
GIVEN of the holding thereof respectively.

That on the said 8th of September 1755, they the said Thomas
Richardson and John Gravenor, being then Bailiffs, and the above-
named James Wilder, then one of the Portmen of the said Town
or Burrough as aforesaid, and a great Number of the then Burges-
ses and Commonalty of the said Town or Burrough, in due Manner,
according to the Custom of the said Burrough, met and assembled
together in the Moot-Hall aforesaid within the said Town or Bur-
rough; and then and there held a Great Court of the same Town or
Burrough, (due Notice of the holding thereof having there been pre-
viously given,) for the Election of Bailiffs of the said Town or Bur-
rough,

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* P. 520. *rough, and for the Tranfaction of divers other lawful and necessary Matters and Businesſes concerning the good Rule and Government of the ſame Town or Burrough.

That the ſaid Sir *Richard Lloyd, John Sparrowe, Samuel Kent, Humphrey Rant, Ellis Brand, Michael Thirkle, Goodchild Clarke, William Hammond,* and *George Foſter Tuffnell*, did not, nor did ANY of them ATTEND or APPEAR at the ſame Great Court of the ſaid Town or Burrough, but WILFULLY ABSENTED *themselves therefrom*; And that They and Every and Each of them WILFULLY *had abſented themſelves from the ſaid other Great Courts* of the ſaid Town or Burrough which had been ſo duly holden in the ſame Town or Burrough within the ſaid Space of One Year then laſt paſt as aforeſaid, and from every of thoſe Great Courts; And had *voluntarily neglected*, and every and Each of them *had voluntarily* NEGLECTED to attend at the ſaid Great Courts ſo holden as aforeſaid, or at any of them: And thereby, Each of them the ſaid Sir *Richard Lloyd &c.* and *G. F. Tuffnell* neglected and omitted the Duty and Execution of his ſaid Office of One of the Portmen of the ſaid Town or Burrough, and thereby DEPRIVED the then Bailiffs Burgeſſes and Commonalty of the ſaid Town or Burrough, *aſſembled at the ſaid ſeveral Great Courts*, of that Counſel Aid Aſſiſtance and Advice which by the DUTY of his Office of Portman of the ſaid Town or Burrough, and according to the OBLIGATION of the OATH of Office by him taken in that Behalf, He ought to have given; To the great Hindrance and Delay of the PUBLIC Buſineſs of the ſaid Burrough, To the great Damage Diſappointment and Prejudice of the Bailiffs Burgeſſes and Commonalty of the ſaid Burrough, and to the great Hindrance and in open Subverſion of the good Rule Government and Conſtitution of the ſaid Burrough.

That thereupon, at the ſame Great Court of the ſaid Town or Burrough holden on the ſaid 8th Day of *September 1735*, for the Purpoſes aforeſaid, (the ſaid Great Court having Notice of the Premiſſes,) It was in due Manner Ordered, by the ſaid then Bailiffs Burgeſſes and Commonalty of the ſaid Town or Burrough then met and aſſembled at that Great Court as aforeſaid, “ That the ſaid Sir
“ *Richard Lloyd, John Sparrowe, Samuel Kent, Humphrey Rant,*
“ *Ellis Brand, Michael Thirkle, Goodchild Clarke, William Hammond,*
“ and *George Foſter Tuffnell*, and each of them reſpectively, ſhould
“ ſeverally and reſpectively HAVE NOTICE of the Neglect of Duty
“ *charged upon each of them*, and be ſummoned to appear at the then
“ next Great Court of the ſaid Town or Burrough that is to ſay,
“ in the Moot-Hall aforeſaid, on Monday the 29th Day of the ſame
“ *September*; ſeverally and reſpectively to ſhew Cauſe, (if they or
“ any of them could,) Why Each of them reſpectively ſhould not
“ be DISCHARGED from his ſaid OFFICE of PORTMAN, FOR his
“ *reſpective* NEGLECTS aforeſaid.”

That

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*That afterwards, and before the Holding of the said then next * P. 521.
great Court of the same Town or Burrough, to wit on the 20th
Day of the same *September* 1755, Each of them the said Sir *Richard*
Lloyd, J. S. S. K. H. R. E. B. M. T. G. C. W. H. and G. F. T.
HAD NOTICE of the said Order so made by the same Great Court,
and of the Charge alledged against Each of them respectively, of his
aforesaid Neglects; and were then and there severally and respective-
ly SUMMONED, and every and each of them was then and there in
due Manner summoned to attend and appear at the said then next
Great Court of the said Town or Burrough to be holden in the Moot-
Hall aforesaid in the said Town or Burrough on *Monday* the 29th
Day of the same *September*, by the Bailiffs Burgessees and Commonal-
ty of the said Town or Burrough, and to shew Cause (if any of
them could) why Each of them the said Portmen respectively
should not be discharged from his said Office of Portman, for his
respective Neglects aforesaid.

That afterwards, that is to say, on the same *Monday* the 29th
Day of *September* in the said Year of our Lord 1755, They the said
Thomas Richardson and *John Gravenor*, being then and there Bai-
liffs of the said Town or Burrough, and the said *James Wilder* being
then One of the Portmen of the said Town or Burrough, And a great
Number of the then Burgessees and Commonalty of the same Town
or Burrough (due Notice having there been previously given in that
Behalf,) did, in due Manner according to the Custom of the said
Burrough, meet and assemble in the Moot-Hall aforesaid within the
said Town or Burrough, And then and there held a Great Court of
the same Town or Burrough in and for the said Town or Burrough;
And the said Sir *Richard Lloyd*, J. S. S. K. H. R. E. B. M. T.
G. C. W. H. and G. F. T. although they were then and there so-
lemnly and severally called for that Purpose, did NOT nor did any
of them APPEAR or ATTEND at that Court, or SHEW ANY CAUSE
Why they and Each of them should not be discharged from the
said Office of Portman of the said Town or Burrough: But they
and each of them did then and there wholly make DEFAULT therein.

That at the same Great Court &c. so holden as aforesaid on the
said *Monday* the 29th of *September* 1755, a FURTHER Day was
given by the same Great Court, to the said Sir *Richard Lloyd* &c. re-
spectively, until the then next Great Court of the said Town or
Burrough to be holden in and for the said Town or Burrough at the
Moot-Hall of the said Town or Burrough on *Tuesday* the 14th
Day of *October* then next ensuing, To shew Cause as aforesaid: And
it was then and there in due Manner Ordered by the same Great
Court, " That the said Sir *Richard Lloyd* &c, and every of them
" should have Notice and be severally and respectively summoned to
" appear at the said then next Great Court &c, to be holden &c,
" on

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* P. 522. “ * on the said *Tuesday* the 14th Day of *October* then next ensuing;
“ severally and respectively to shew Cause, (if any of them could,)
“ why they and Each of them respectively should not, *for the*
“ Cause *aforesaid* alledged against Each of them respectively, be dis-
“ charged from his Office of Portman of the said Town or Bur-
“ rough, *for his Neglects* *aforesaid*.”

That afterwards, and before the Holding of the said then next Great Court of the same Town or Burrough, to wit, on the 10th Day of the same *October* in the said Year of our Lord 1755, They the said Sir *Richard Lloyd &c*, and each of them respectively, *had due Notice* of that Order, and of the Charge alledged against each of them respectively, of his *aforesaid Neglects*; and were then and there severally and respectively *summoned*, and every and each of them was then and there *in due Manner summoned to appear and attend* at the said then next Great Court of the said Town or Burrough to be holden in and for the said Town or Burrough, on *Tuesday* the 14th Day of *October* then next ensuing, To shew Cause, (if any of them could,) why they and each of them respectively should not, *for the Cause aforesaid* alledged against each of them respectively, be discharged from his Office of a Portman of the said Town or Burrough, *for his Neglects aforesaid*.

That on the said *Tuesday* the 14th of *October* *aforesaid*, in the said Year of our Lord 1755, *Lark Tarver* and *Thomas Bowell* were Bailiffs of the said Town or Burrough; And that the *aforesaid Sir Richard Lloyd &c*, And *James Wilder*, were the then *only* Portmen of the said Town or Burrough.

That on the said *Tuesday* the 14th Day of *October* *aforesaid*, They the said *Lark Tarver* and *Thomas Bowell*, then being Bailiffs of the said Town or Burrough, and the said *James WILDER* then ONE of the Portmen of the same Town or Burrough, and a great Number of the then Burgeesses and Commonalty of the said Town or Burrough (*due Notice* in that Behalf having there been previously given,) did, in due Manner according to the Custom of the said Burrough, meet and assemble in the Moot-Hall *aforesaid* in the said Town or Burrough, and then and there held a Great Court of the same Town or Burrough, for the Transaction of divers lawful Affairs concerning the Good Rule and Government of the said Town or Burrough.

That at the same Great Court, &c, so holden as *aforesaid* on *Tuesday* the 14th of *October* 1755, The *aforesaid Sir Richard Lloyd &c*, were severally and solemnly called, and every and each of them was severally and solemnly called to appear and shew Cause at that Court, (if any of them could,) why each of them respectively
I should

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* should not, for his Neglect of Duty aforesaid charged and alledged* P. 523.
against each of them respectively, be discharged and removed from
his said Office of Portman of the said Town or Burrough. That
they the said Sir *Richard Lloyd &c*, being so respectively and so-
lemnly called as last aforesaid, DID NOT *nor did any of* THEM
ATTEND *or appear or shew any Cause* whatsoever, at that Court, why
they or any of them should not be discharged and removed from
his said Office of Portman of the said Town or Burrough: But they
Every and Each of them did then and there *wholly make Default*
therein; and *neither* they nor any of them, nor any Person on the
Behalf of them or any of them, did then require any future Day
or Time to be allowed to them or any of them, to shew Cause as
aforesaid. WHEREUPON, the said *Lark Tarver* and *Thomas Bowell*,
then being Bailiffs of the said Town or Burrough, And the Rest of
the said Burgessees and Commonalty of the said Town or Burrough,
then so met and assembled, and holding the said Great Court of the
said Town or Burrough as aforesaid on the said 14th Day of *October*
in the Year last mentioned, having taken the Premises into their Con-
sideration, and having fully and deliberately weighed the same; The
said COURT did then and there ORDER "That Each of them the said
" Sir *Richard Lloyd*, *J. S. S. K. H. R. E. B. M. T. G. C. W. H.*
" and *G. F. T.* should be DISMISSED DISCHARGED and REMOVED
" from his Office of a Portman of the said Town or Burrough: And
" Each of them respectively was then and there, by the said Court,
" FOR his said Neglect of Duty, DULY discharged and removed from
" his Place and Office of Portman of the said Town or Burrough;
" and Each of them hath ever since remained and been, and yet is
" discharged and removed therefrom."

That the aforesaid Sir *R. L. J. S. S. K. H. R. E. B. M. T. G. C. W. H.* and *G. F. T.* being so respectively discharged and re-
moved from their said respective Offices as aforesaid, He the said
James Wilder, afterwards on the same Day and Year, and from the
Time of their said respective Discharges and Removal UNTIL AND
AT the Time of the Election of OTHER Portmen of the said Town
or Burrough herein after mentioned, remained and was a Portman
of the said Town or Burrough; and then, and during all that Time,
was the ONLY Portman of the same Town or Burrough.

That afterwards, on the said *Tuesday* the 14th Day of *October*
aforesaid in the Year last mentioned, the said *James Wilder*, being
THEN the ONLY Portman of the said Town or Burrough, retired
and went into the Room called the Council-Chamber, in the Moot-
Hall aforesaid in the said Town or Burrough, in Order to elect
Other Burgessees of the same Town or Burrough, resident and in-
habiting within the said Town or Burrough, to be Portmen of the
said Town or Burrough in the Places of Portmen of the said Town
or Burrough VACANT as aforesaid; And did then, in the said Room
6 K there

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* P. 524. * there, *in due Manner* ELECT HIM *the said* THOMAS RICHARDSON (being then and there a Burgeſs of the ſame Town or Burrough, inhabiting and reſident within the ſame Town or Burrough, and a fit and proper Perſon to be a Portman thereof,) to be *One of the Portmen* of the ſaid Town or Burrough, *in the Place of* One of the Portmen of the ſaid Town or Burrough THEN VACANT *as aforeſaid*.

That he the ſaid *Thomas Richardson*, being ſo *eleſted* to be a *Portman* of the ſaid Town or Burrough, afterwards and before he was admitted to or took upon him the Execution of that Office, that is to ſay, at the ſame Great Court of the ſaid Town or Burrough, in the Moot-Hall aforeſaid, on the ſame *Tueſday* the 14th Day of *October* in the Year laſt aforeſaid, at the ſame Great Court of the ſaid Town or Burrough, in the Town-Hall aforeſaid, did then and there, BEFORE *the ſaid Lark Tarver* and *Thomas Bowell* then BAILIFFS of the ſaid Town or Burrough, in *due Manner* and *according to the Uſage and Cuſtom* of the ſaid Burrough, *take his Corporal Oath for the faithful and due Execution of the ſaid Office* of a Portman of the ſaid Town or Burrough in all Things concerning the ſame, and ALL OTHER Oaths then required by Law in that *Be-half*: And thereupon, He the ſaid *Thomas Richardson* was then and there, at the ſame Great Court, in *due Manner* admitted into the ſaid Office of a Portman of the ſaid Town or Burrough. And thereupon, and by Virtue thereof, He the ſaid *Thomas Richardson*, afterwards, that is to ſay, on the ſaid 14th Day of *October* 1755, and continually from thence until and at the Time of exhibiting the Information, was and ſtill is a *Portman* of the ſaid Town or Burrough.

And by that Warrant &c. &c.

The King's Coroner and Attorney demurs *generally*: And the Defendant joins in Demurrer.

This Caſe was three Times argued.

The *General* Queſtion was, “Whether the Defendant has ſhewn a *ſufficient Title* to the Office:” Which general Queſtion was divided into two *ſubordinate* Ones; *viz.*

1ſt. Whether the Nine Portmen had been *well and duly* REMOVED; And (admitting that they were ſo.)

2dly. Whether the *Defendant* was *well* CHOSEN.

1ſt Objection
to the Re-
moval.

Fiſt—The Couñſel for the Crown urged, That the Perſons moving had *no POWER to amove*. For a Corporation have no ſuch Power

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Power inherently or *incidentally*: And none is, in the present Case, * P. 525. either given to this Corporation by Charter, or claimed by Prescription.

They cited *Magna Charta*, c. 29. “*Nullus liber homo disseisietur de libero tenemento suo, nisi per legale iudicium parium suorum, vel per legem terræ.*” *James Bagg's Case*, 11 Co. 93 to 99. 1 Ro. Rep. 224, 225. S. C. and S. P. The Crown may, by Writ, discharge some Officers, after Conviction. See Sir Robert Sawyer's Argument on the *Quo Warranto* against London, fo. 22. *State Trials Vol. 4*, fo. 810. S. C. Where Sir Robert mentions the Case of a Coroner: F. N. B. New Edit. 381. Old Edit. 163. *Writ de Coronatore eligendo vel exonerando*. Register 177, 178. *Writ de Coronatore eligendo; & de Viridario eligendo*. F. N. B. New Edit. 383. Old Edit. 164. *Writ de electione Viridariorum Forestæ*. Dyer 333. Pasch. 16 Eliz. pl. 28. which was a Restoration by Writ of a Citizen of London, who had been disfranchized.

These Authorities they cited, to illustrate and deduce the Position “That, in Consequence of a Conviction, Writs shall issue out of the King's Courts, where the Conviction is;” and to shew “that the Power is originally in the Crown.”

In *Yates's Case*, Style 477, 480. it is said “There must be a Custom or a Statute to warrant a Disfranchisement.” 1. *Ld. Raym.* 391. *Rex v. Mayor of Coventry*, M. 10 W. 3. (2d Point,) The Court held that the Corporation ought to shew a Power, either by Custom or under their Letters Patent. 2 *Ld. Raym.* 1564, 1565, 1566. M. 3 G. 2. *Rex v. Mayor &c. of Doncaster*, recognizes the Authorities of *Bagg's Case*, and *Yates's Case*, “That a Freeman shall not be removed, but by Charter or Prescription.” That Return was quashed; and a peremptory *Mandamus* issued. And M. 29 G. 2. B. R. *Rex v. Ponsonby* was agreeable to this.

The only *Dictum* to the contrary of this Doctrine, is in 2 *Strange* 819, 820. Lord Bruce's Case: where it is said “that the Modern Opinion has been, that a Power of Amotion is *incident* to the Corporation.” But this Report ought to carry but little Weight: For other Accounts of that Case differ from it; And no such modern Opinion as there hinted at, does any where appear.

Second Objection (under the first Point.)

Here was NO *sufficient* CAUSE of Removal of these 9 Portmen.

2d Objection
to the Re-
moval.

Their NON-ATTENDANCE was no Breach of their Duty so as to occasion a Forfeiture. 1 *Hawk. P. C.* 168. says that the Notion of Forfeiture by bare Non-User is not well warranted by the Authority cited in Maintenance of it.

This

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* P. 526. * This Duty, " of attending to advise and assist the Bailiffs at the " Great Courts," is NOT *constant and continual*; but OCCASIONAL *only*, and when they receive *Notice* to do so: They are not obliged to attend the *ordinary* and *common* Business of these Great Courts. And it is not here alledged, " that any Counsel, Aid, Assistance, or " Advice was wanting." Indeed, the Plea " concludes that this was " to the Damage and Prejudice of the Corporation, and their Hin- " derance &c."

But there is *no special Damage* laid: And the stating a *General* Damage to the Corporation is not enough; without shewing a *particular* Prejudice to them. 1 *Inst.* 233. *b.* is expressly so.*

* As to private Offices: Not as to public, which concern the Administration of Justice or the Common-Wealth.

A Burgess's Non-Attendance at Sessions, is no Cause sufficient for a Removal of him. *Regina v. Mayor and Burgesses of Pomfret, M. 11 Anne*, in *Lucas's Report* 107. is expressly so resolved.

But even admitting they had this Power of Removal; Yet, it ought to be for *such* an Offence as was *against their Oath of Office*: and consequently, *this Oath of Office* ought to be *set forth*. *Style* 477, 478. 2 *Ld. Raym.* 1233. in *Serjeant Whitaker's Case—Regina v. Ballivos, Burgenfes &c. de Gippo*: There the Oath is *set forth*. Here, it is not.

3d. Objection to the Removal. Third Objection (under the first Point)— This is not a Removal *by the whole Body*, at a *Corporate Assembly*; but by a particular *Court*. In *Cartbew* 172. *Sir Peter Rich v. Pilkington*, the Court of Mayor and Aldermen was holden *not* to be a *Corporate Assembly*; but a *Court*. So here, this *Great Court* was only a *mixt Assembly*; and *not* the Mayor Burgesses and Commonalty.

4th. Objection to the Removal. Fourth Objection (under the first Point.) The Removal is NOT *under their Common Seal*. 1 *Salk.* 192, The Mayor of *Thetford's* Case, is in Point, " That a Corporation can not do an Act in *Pais*, " without their Common Seal." 13 *H.* 8. 12. *Plowd.* 91. *b.* 92. *a.* 2 *Saund.* 305.* 3 *Lev. Manby v. Long et al.* † 1 *Ventr.* 47. *Horn v. Ivy.* 1 *Mod.* 18. *S. C.* ‡ In 1 *Ventr.* 355. *Haddock's Case*, The Words are, " If the Power to remove be at their Will and Plea- † (2d. Exception to the Plea.) " sure, this Will *must* be expressed *under their Common Seal*: But in " a *Return to a Mandamus, Debito modo amotus* may suffice." There is a Note, at the Bottom of the *Colchester Case* in 1 *Peere Wms.* 596, " That the Method of disfranchising a Corporator, (in order to examine Him as a Witness,) is by an Information in the Na- ‡ All these last Cases do not authoritative- ly prove the Point; not being the Point resolved " ture of a *Quo warranto* against the Member; who confesses the " Information: On which, there is a *judgment* to disfranchise Him." The present Case is NOT *like* to a *Return to a Mandamus*; where the mere Return of his being " *debito modo amotus*" is sufficient: Here

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* Here, it ought to be *so pleaded*; this being a *Plea* to an Information : * P. 527.
which *Plea* ought to be taken against the Pleader.

Fifth Objection (under the first Point) was to the Want of 5th Objec- PERSONAL Notice being given to the 9 removed Portmen, "to attend tion to the Removal.
" the five Great Courts first mentioned in the *Plea* ;" (for the Non-
Attending whereof, they were afterwards removed.)

This Objection was first started by Lord *Mansfield*; who observed that for the Meetings assembled for doing Corporate Acts, A *Summons* (of *some Sort or other*) is necessary; And that *here*, the Offence itself turns upon Absences from several Courts, *not* holden (except one of them) *upon* STATED Days, during the Period of about a Year; Yet *no* PERSONAL Notice to these Portmen is alledged by the *Plea*; but only, in general, "that DUE Notice was given of
" the holding thereof respectively : " So that it does *not appear* that they had *any Reason to think of any* PARTICULAR or SPECIAL *Business*. And *if so*, the particular Notice afterwards given them, " to shew Cause why they should not be disfranchised," will not affect them: For *that* is quite a subsequent distinct Transaction.

Therefore He offered to hear a further Argument on this single Head if the Parties desired it. Which they did: And this Objection was argued by itself.

The Counsel for the Crown *also* objected to the Notice given to these Portmen, of the Courts at which they were to have attended *to shew Cause* why they should not be disfranchised.

1st. They argued that it was *not* their Duty to have attended *at ALL Great Courts*, upon GENERAL Notice of them, WITHOUT PARTICULAR and PERSONAL *Summons*. For without such *personal* Notice, they could not be guilty of such a Laches as would be a Ground for a Forfeiture of their Office.

2dly. They insisted also that PARTICULAR and PERSONAL Notice ought to have been given them, of the Charge, and of the Intention to disfranchise. 1 Salk. 214, *Nurse v. Framton*. 8 Rep. 93, *Fraunces's Case*, (3d. Resolution.) And although it is alledged, " that EACH of them *respectively* HAD Notice ; " * yet this was *not* * V. post 540.
enough: But a *particular* and *specific* *Summons* ought to be set forth. And they cited *Style* 446, 452. *The Protector and the Town of Colchester, Bernardiston the Recorder's Case*. 4 Mod. 37, *Glide's Case*. *Cases temp. W. 3. fo. 29.* S. C. *Bagg's Case*, 11 Rep. 99. a. And it is likewise so in *Actions*. *Fletcher v. Ingram*, last cited Book, fo. 87, 88, (v. *Cases temp. W. 3.*) was a *Replevin*; And " *Notitiam habuit* " was holden too general. 1 Ld. Raym. 225, 226.

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* P. 528. * *Rex v. Chalke* upon a *Mandamus* to restore an Alderman, *per Holt*,
“ A Summons is necessary, that the Person charged may be *pre-*
“ *pared* to make his Defence.” And this ought to be *personal*.
And it must be given by the proper Person. 6 *Rep.* 29. *a. b. Green's*
The 1st Point. Case: Where no Lapse incurred for want of it's being given in
Certainty and explicit Particularity, and by the proper Person too.

Now the Words in the *present Allegation* “ that each of them
had “ Notice,” may be *true*; *though* they had no *proper, regular,*
and *personal* Notice.

Second Point (*viz.* Second subordinate Question.)

The Defendant has NOT *been* DULY ELECTED, and *sworn*.

1st. Objection
to Defen-
dant's Elec-
tion.

1st. For the Election ought to be by the *Residue*; And “ *Residue*”
is a *plural* Term, and imports “ *the others*.” Whereas here was
only ONE SINGLE Portman left, And He *alone* elected the Defen-
dant into this Office.

The Custom requires “ the *Portmen* to *assemble*.” Which Expres-
sion necessarily imports some *Number* of them, at least more than
One; For *One* alone can never be said to *assemble*. And all Char-
ters ought to be taken according to the Custom subsisting at the
Time of granting them. 2 *Inst.* 282. And here they have been
reduced to *One*, not by the Act of Providence, but by the voluntary
Act of the Corporation themselves.

2d. Objection
to Defen-
dant's Elec-
tion.

2dly. The Custom also requires a *reasonable and convenient Time*,
“ between the Happening of the Vacancy, and the Election of a
“ new Portman.” Whereas this Election Admittion and Swearing
of the Defendant to be *One* of the Portmen in the Place of *One* of
those removed, were all *immediate*.

3d. Objection
to Defen-
dant's Elec-
tion.

3dly. Besides, He ought to have been elected into the *Place* of
some *particular* Portman; not in *general*, “ into the Place of *One*
“ of them then vacant.”

4th Objec-
tion to De-
fendant's
Election and
Swearing.

4thly. The Plea does not sufficiently particularize the Oath of
Office, (*vide Style* 478;) nor alledge that the Persons who *admini-*
stered the Oaths to the Defendant, (*viz.* the Bailiffs,) “ *had such*
“ *POWER to administer them*. It is only averred “ That He took
“ them before them in due Manner and according to the Custom.”
1 *Strange* 539. *Rex v. Decan. et Capitul. Dublin. Per Eyre Justice*,
“ In the Case of Corporations, where the *Charter doth not empower*
“ any Body to give the Oath, they are forced to get a *Dedimus* out
“ of Chancery.” *M. 8 G. 2. B. R. Rex v. Gibbon*, a Freeman of
New

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* *New Romney*; on a Motion for a new Trial: per *Ld. Hardwicke* * P. 529.
“ The Defendant, when He comes to make a Title against the
“ Crown, upon an Information in nature of a *Quo warranto*, must
“ make a *complete* Title to the Office; and must shew a RIGHT of
“ Swearing:” And his Lordship expressly added, “ Shewing that
“ he was sworn in due Manner and Form, *alone* is *not* sufficient.”
Now here, he has *not* shewn “ That the *Bailiffs* had a *Right* to
“ administer the Oath.”

The Counsel for the DEFENDANT First observed that a PLEA is *Ex parte Def.*
to be taken to a *common* Intent: 'Tis *not* like a *Mandamus to restore*;
which must be taken *more strictly*.

It appears, they said, upon this Plea, that there was *in Fact* a *Removal* of former Portmen; a *Vacancy* occasioned thereby; and an *Election* of the Defendant into the Office, upon *that* Vacancy. The POWER to remove, is to be tried in *another* Method; at least, more properly than by *this* Method: However, the Defendant is content to have the Merits determined in *this* or *any* Method.

Having premised thus much in general.—

1st. They urged that this Power of Removal is *implied* and *inherent* and INCIDENTAL to the Constitution of a Corporation.

Answer to
1st Objection
to the Removal.

The Law gives *whatever is necessary* to the Enjoyment of a Grant. Upon this Principle, is founded the *Power of making By-Laws* by Corporations: Much more, must they have Power inherent in them to exercise *Acts ESSENTIAL to their Existence and Preservation*.

The Power of *Amotion* is One of these; and is NOT *limited* to Cases where the Party has been *previously* CONVICTED. Their Power of Amotion is the *same*, after Conviction, as *before*; neither greater, nor less: The *Conviction* working no CHANGE, either upon the Charter or Prescription.

Conviction is not a true Criterion of Guilt. For atrocious Crimes are nor purged, with respect to the Corporation, by a *Pardon before Conviction*; (which the Crown may grant, if they please:) Or the Offender may run away; and *thereby avoid being convicted* at all.

Such Amotion can not be contrary to *Magna Charta*. For a Man may certainly be removed from his *Freehold*; if he can be so by the *Law of the Land*. So that there is no Argument to be drawn from *Magna Charta*, as to this Question.

If a Corporation have no inherent Power to disfranchise, How can they do it even *upon Request* of the Corporator himself? Yet that was *Fidderley's* * Case.

* V. 1 Siderf.

But^{14.}

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* P. 539. * But *this* is NOT a *Disfranchisement* of a *Freeman*; but only a Displacing an *Officer* from an *OFFICE*, leaving him STILL a *Free-man*. And surely, *this mere DISPLACING from an Office* can never demand a *previous Conviction*.

Suppose an *Officer* becomes, by the Visitation of Providence, *insane, blind, or otherwise incapable to execute his Office*; may not He be removed from such *Office*? Ours is not an arbitrary Removal *ad libitum*; but a Removal for *good Cause*.

The Case of the Corporation of *Doncaster*, in 2 *Ld. Raym.* 1564. (on a *Mandamus* to restore *Scott* to be a Capital Burgefs,) makes the *Distinction* between * turning out from an *Office*, and *disfranchising*.

* At p. 1566. indeed the Court observe
“ that the
“ Charged did
“ not affect
“ him as a
“ Capital
“ Burgefs;
“ but only as
“ Chamber-
“ lain.”

† Qu. What Case, or when:

§ V. post 533. or 534.

Lord *Bruce's* Case in 2 *Strange* 819. is an Authority for us: For it says expressly, “ that the *Modern Opinion* has been that a Power of Amotion is incident to a Corporation; though *Bagg's* Case “ seems contrary.” So in the Case of *Rex v. Plimpton temp. Ld. Hardwicke*.† And from the nature of the Thing, it must be in-
herent in the Corporation.

Besides, here is an IMPLIED Power to remove, by the Custom. For it is “ to go to Election &c. whenever any Vacancy happens by “ Removal &c of any Portman or Portmen:” Which implies that the Corporation must have a *Power to amove*.

In the Case of *Mr. Fetherston-haugh, Rex v. Mayor of Newcastle upon Tyne, Mich. 1747. 21 G. 2. B. R.* the Court would not grant a peremptory *Mandamus* to restore Him; though the *Common Council* who removed him, had no Power in *them* to remove, but that Power must have been in *the Body at large*, if it existed at all. However, here, the Removal is by the *Body at large*.

In the Case of *Rex v. Tidderley, 1 Siderf. 14.* It appears that the *Ld. Ch. Baron Hale* thought that Corporations *had* this Power, “ to “ remove for good Cause;” As Corporations, and *incidentally*.

It has been said, “ that, after Conviction, the Corporation may “ have a *Writ from the Crown* to remove the Offender.” But this is a *Dangerous Doctrine*, “ that Corporators may be removed by *Writ from the Crown*.”

As to the Cases cited—Some of them relate to Coroners, Ver-
derers &c; which are not applicable to Corporators.

Bagg's Case was upon a *Mandamus* to restore: And there was NO *sufficient Cause* of Removing him from his *Franchise*. All the
rest

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* rest of the Case is *extrajudicial*: And the latter Part of it does not * P. 531. appear in *Ld. Rolls's* Report of it. So that, probably, it was *only* the *Reporter's* own Opinion; and *not* said by the Court.

And if a Corporation has inherent Power to remove, the Citation from *Magna Charta* does not oppugn it: Because, in such Case, it is "*per legem terræ*."

Style 478. was the Case of a *Freeman disfranchised*; *not* an Officer *only removed* from his particular Office.

As to 1 *Ld. Raym.* 391, *Rex v. Mayor of Coventry*, It was a *Mandamus to restore*: And the Cause returned was holden * insufficient. * Yet still it seems to be an Authority

For the Court held "that they ought to have shewn either Custom or Grant to remove."

As to 2 *Ld. Raym.* 1564, the Distinction abovementioned is expressly taken: And the Cause returned was holden † insufficient. † Yet it is an Authority in: Point, in express Terms, "that a Freeman shall not be removed by a Corporation, unless by virtue of "a Charter or Prescription."

As to the 2d Objection (under the first Point,) concerning the CAUSE of Amotion of the 9 Portmen— Answer to 2d Objection to the Removal.

It appears to be a Cause fully sufficient: For they had *neglected the Duty* of their Office, even *after Notice*. 1 *Inst.* 233. *a.* proves this to be a Forfeiture of Office: For Lord Coke there expressly says "that *Non-User* of Public Offices is, of it || self a Cause of Forfeiture." And in the *Nature of the Thing*, it was so in the present Case. The Corporation have a RIGHT to their Attendance: And the Right and the Obligation ought to be reciprocal. || V. ante, pa. 526. in Margin.

And how is it possible to assign a *special* Damage, where several Officers are *equally* obliged and *equally* negligent? However it is charged to be "*to the Damage and Prejudice* of the Corporation."

It is a tacit Condition, that *Neglect of Duty* is a *sufficient Cause* of Disfranchisement. *Bagg's Case* 98. *a.* In 2 *Ld. Raym.* 1275. *Regina v. Truebody*, Who left the Burrough and lived out of it several Years, and *neglected Attendance* at the public Assemblies &c. This was holden a good Cause of Disfranchisement. In 4 *Mod.* 33. *Glide's Case*, The whole Court agreed in this Opinion, "that "an Alderman's deserting his Office was a good Cause of Disfranchisement." And *Holt* said "So was absenting himself from "the Council, in the very Nature of the Thing." In *Cartbrew* 227. *Vaughan v. Lewis* *Ld. Ch. J.* *Holt* was of Opinion, "That "the not inhabiting *infra* the Burrough &c, was a good Cause to "remove a Member.

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- * P. 532. * In the Case of *Rex v. Ponsonby*, it did not appear "That there
" *was* any Non-Attendance:" It only appeared "That they lived
" out of the Burrough."

And this wilful Absence and Neglect of the 9 removed Portmen could not but be contrary to their Oath of Office too; though their *Oath of Office* is only mentioned *consequentially*, in setting forth their Offence in the Plea.

Answer to
3d. Objection
to the Re-
moval.

As to the 3d Objection under the first Point—It is objected, "that this was *not a Corporate Meeting*." But it clearly was so: The Meeting consisted of *all the integral Parts* of the Corporation; And the Portmen must be Freemen. It was not necessary to *specify the Names* of the Corporators who were present. These Portmen were removed at a Corporate Assembly, met to do Corporate Acts; And upon a *Contumacious Refusal to attend and shew Cause* why they should not be amoved.

Answer to
4th Objec-
tion to the
Removal.

4thly, It is Objected, "that it was *not under the Common Seal*."

As to which, 1st. That was *not necessary*: And 2dly, It is done *upon Record*; which is of *as high a Nature*.

And Members are, in every Day's Experience, amoved without any *Judgment*.

Answer to
5th Objec-
tion to the
Removal.

As to the Want of *Personal Notice*, viz, "Whether the Absence
" of these Portmen, whose *Presence was NOT particularly necessary*,
" and who had *no particular Notice* of any *special Business*, or any
" *Reason to suspect* any particular and special Business to be done
" at these Courts, made a Forfeiture, or was a sufficient Ground of
" *Amotion*."—

They cited 9 Co. 50. a. in the Earl of *Salop's Case*. Non-User or Non-Attendance is a Forfeiture of such Offices as ought to be attended without Demand or Request.

2 *Ld. Raym.* 1237. Serj. *Whitaker's Case*. It was holden "that
" Non-Attendance was a Cause of Forfeiture: And he was bound
" to attend, *at his Peril*, being a *public Office* concerning the Ad-
" ministration of Justice."

It is their Duty, as much as if they had actually covenanted to do it. And it appears by *Palmer 332. Bishop of Rochester v. Young* "That a Covenantor shall *take Notice*; and there is *no Need of*
" *personal Notice*." And this Notice is *EQUIVALENT to personal Notice*.

For

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* For it is reasonable to *presume* that they were *resident* in the Cor- * P. 533.
poration. *Cartbew* 227, 229. *Vaughan v. Lewis*, (the last Point)
Ld. Ch. J. *Holt* held "That the not inhabiting within the Bur-
rough, ought to have been returned as Special Matter." 5 *Mod.*
438, 442. *Vanacker's Case* *—*Per Holt* Ch. J. "Every Member * 4th Objec-
" of a Corporation, though absent, is *supposed* in Law to be there." tion.
2 *Ro.* 136. Title *Notice*—Commoners are obliged to TAKE No-
tice of Ordinances made by the Homage under a Custom. *Cro.*
Car. 497. S. C. *James v. Tutney*. There, it was, by the Custom,
the Duty of all the Commoners, to appear at the Court. So here,
it is stated to be the Duty of these Portmen, to be resident. And
Non-Residence ALONE is a Cause of Forfeiture.

And the Frequency of Corruption of the original Institution is
a good Reason for reforming.

Their contumacious Disobedience to the Summons to shew Cause
why they should not be disfranchised, shews their former Neglects
to be wilful. They absented themselves 5 successive Courts; though
only One other Portman was left.

An Officer *refusing to come when demanded*, forfeits his Office.
Bro. Forfeiture de terre, pl. 61, 115.

And "due Notice" is alledged; Which is *confessed* by the De-
murrer.

Second Point—The Defendant was *duly and legally* ELECTED,
and sworn.

Indeed, if he was not, the *Corporation is gone*: And therefore
the Court will *endeavour to save it*, rather than let it be destroyed.
And so they did, in the late Case of the Corporation of *Carmar-*
then. P. 1755. 29 G. 2. B. R.

1st. The Word "*Residue*" only imports *what is left*; and does not
necessarily imply Plurality. *Wilder* was "*the RESIDUE*." Confe-
quently, he could continue the Corporation.

Answer to 1st
Objection to
Defendant's
Election.

The Court will construe these Words favourably, *Regina v. J. S.*
Burgefs of the Devises, 7 *Ann.* in Hilary Term, was such a Con-
struction. And so here, Death or Amotion might reduce the
Number to Two or even to One: In either of which Cases, there
might be a Want of Majority amongst them. So that the Court
will make such a Construction as to support the Charter.

2dly.

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* P. 534. * 2dly. As to the *Time*.—The sooner it was done, the better :
Answer to 2d And especially as there was only One Portman left. If he had died,
Objection to the Corporation had been dissolved. They had a Right to fill up
Defendant's the Vacancy *immediately*.
Election.

Answer to 3d 3dly. The Election into *One* of the Vacancies is enough : It was
Objection to not necessary to specify *which*.
Defendant's Election.

Answer to 4th 4thly. As to the *Swearing in* of *Richardson*—It is alledged “ that
Objection to “ he was sworn in before *L. T.* and *T. B.* then Bailiffs of the Bur-
Defendant's “ rough, in *DUE Manner*, and *ACCORDING to the Usage and Custom*
Election. “ of the said Burrough;” And “ that he had taken All the requi-
“ site Oaths:” And they might have traversed this, and taken Issue
upon it. But they have demurred generally : And this is good on
General Demurrer. However, these Slips may be amended, on
Motion.

Reply. The Counfel for the Crown replied That Powers do *not always*
1st Objection arise to Corporations, upon *every* Cafe of Necessity.
to Removal.

A Pardon will have the same Effect in this Cafe, as in all Others.

Where the Corporation is *not* possessed of the Power, the Amo-
tion is NOT *per legem terræ*.

An ACCEPTANCE of a Corporator's Surrender does *not operate* AS
a Disfranchizement.

As to the IMPLIED Power given by the Charter—Such a Power
is NOT ALLEDGED: And the Court will *not presume* such a Power
against the Crown.

As to the Cafe of the Corporation of *Newcastle*—Nothing was
done in it: Mr. *Fetherston* had for very many Years *deserted* the
Corporation; and *therefore* the Court suspended granting the pe-
remptory *Mandamus*.

As to Lord *Bruce's* Cafe in 2 *Strange* 819. It is only a loose and
mistaken Report of it.

As to the Cafe of *Rex v. Plimpton*—It is not stated, nor can the
Counfel on the Other Side give any Account of it.

We do not contend “ That *the Crown* can disfranchise a Cor-
“ porator by Writ:” But We say that the Crown may give Notice of
the Determinations of the Law; which it's Ministers are to execute.

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* Lord Coke reports what We have cited out of *Bagg's Case*, As * P. 535. *the Determination of the Court*; not as his own extrajudicial Opinion.

As to the *Doncaster Case*—We have cited it from Lord *Raymond*: We do not know what the Man was. [*v. 2. Ld Raym. 1564.*]

As to the *Cause* of Removal, We do not say “That a Portman^{2d Objection} was *not obliged* to attend the great Court;” But “That it was^{to the Removal.} not necessary to the *Existence* of that Court;” Nor is it *shewn* to be contrary to the Obligation of their Oath of Office. *Non-Attendance* might indeed be a *Misdemeanour*, but is NOT a *Cause of FORFEITURE*; especially, without SPECIAL *Damage* shewn. And it is *such* a *Misdemeanour*, that an Indictment or Information will lie against a Corporator for it: So that there MIGHT *have been* a *previous Conviction*, in the present Case.

And though this is an *Information*, not a *Mandamus*; yet this Man has here set out his own *Title*; which appears upon his own Plea to be a *bad One*: And therefore the Court *must give Judgment AGAINST him*. And this seems a very *adequate Remedy*. If a person be improperly elected, He is to be *removed* by a Judgment of *Ouster*. *Afterwards*, indeed, Those who have Right may be *admitted*, upon a *Mandamus*.

It does not appear that this Court was a CORPORATE *Assembly* of^{3d Objection} the *Mayor Bailiffs and Burgeffes*. And, as to a CONTUMACIOUS^{to the Removal.} *Refusal* to attend—There is no Pretence to suppose it: They are only said “Not to have attended upon *due Notice* given of the “Great Courts.” There was no PARTICULAR *Summons* to attend them; nor any PARTICULAR *Call*, for their Advice and Assistance.

A Corporation can do no *important Act* without their *Seal*. And^{4th Objection} this Great Court was NO *Court of Record*.^{to the Removal.}

As to the want of *Personal Notice*—This is not like the Case of^{5th Objection} a Bond: which obliges the Obligor to *take Notice*. *Palm. 532.* is^{to the Removal.} similar to the Case of a Bond: There, *Young* covenanted to find Provisions for the Steward &c.

Vanacker's Case too is quite of another Tendency and Consideration: There, the Notice was proper Notice to the whole Body; and was taken to include every Member.

The “DUE Notice given” is * *not alledged* to be given *Personally*^{* V. ante pa. 519.} *to them*: And therefore is not confessed by the Demurrer.^{“ Due Notice had been given, “ of the holding, &c.”}

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* P. 536. *As to Lord *Shrewsbury's* Case—The Clerk of the Market is certainly an Office that must of necessity be constantly attended: And the other Offices there specified and hinted at, are such as are of Necessity, for the Administration of Justice; and where the Public must suffer by the Officers not attending.

Non-Inhabitancy is NO part of the Charge against these Port-men: 'Tis *Non-Attendance* at 5 successive Courts. But there was NO Reason for them to think of any SPECIAL Occasion for their Attendance; nor any particular Notice to any such Purport.

2d Point—The Court will not support an Usurpation against Law.

1st. Objection to Defendant's Election. The Words are "*Residue of THEM*;" "*Major part of THEM*:" And they are to "*ASSEMBLE, &c.*" All which Expressions import a Number of Persons; at least, more than One Individual.

The Case of the Burgesses of the *Devizes* was considered as the Act of the *nineteen*: And that Corporation was a fluctuating Body; and any Majority of their Number for the Time being, might do the corporate Acts.

Two may elect, in the present Case; provided they agree: And Two are certainly the Major part of two. And these Words are not merely *directory*. No Power of Election is given to ONE only.

And this can't be *presumed*. They ought to have *alleged* and *shewn* such a Power.

4th Objection to Defendant's Election. The *Bailiffs* had no Power to administer the Oaths. So that the Defendant did NOT take them duly and effectually.

It was impossible for us to *traverse* what they never alleged.

Resolution of the Court. LORD MANSFIELD now delivered the Resolution of the Court.

The General Question upon the Plea is, "Whether the Defendant has set out a good Title to the Office of a Portman of the Town or Burrough of *Ipswich*."

The Title he sets out is, That upon a Vacancy made by Removal, He was duly elected, sworn, and admitted into the said Office to fill up such Vacancy.

His Right therefore must depend upon two general Points;

1st. Whether the *Vacancy* was duly made;

2dly. If

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*2dly. If it was, Whether the Defendant was *duly elected admitted** P. 537. and *sworn*.

Upon the first Point, the principal and material Objections are Two ;

1st. That the Corporation of *Ipswich* has *no Power to amove* :

2dly. Suppose they have Power, the *Cause* of Amotion is not sufficient.

Upon the second Point ; one Objection is chiefly relied upon ; viz. That, after the Amotion, *James Wilder* being the ONLY remaining *Portman*, the Election under which the Defendant claims, was SINGLY *by him* : But One can not elect.

Then his Lordship stated the Record ; which see before *pa.* 517, &c.

Upon the first Point,

1st Objection—That they had *no Power* to amove.

1st. Objection
As to the
Power of Re-
moval.

This Objection depends upon the Authority of the second Resolution in *Bagg's Case*, 11 Co. 99 : Where it was resolved, “ That
“ no Freeman of any Corporation can be disfranchised by the Cor-
“ poration ; *Unless* they have Authority to do it either by the *ex-*
“ *press Words of the Charter*, or by *Prescription* : But if they have
“ *not* Authority either by *Charter* or *Prescription*, then he ought
“ to be *convicted* by Course of Law, before he can be removed.
“ And this appears by *Magna Charta*, c. 29 : Nullus liber homo
“ capiatur, vel imprisonetur, aut *disseisietur de libero tenemento suo*,
“ vel libertatibus, vel liberis consuetudinibus suis &c ; *nisi per legale*
“ *judicium parium suorum*, vel per *legem terræ*. And if the Corpo-
“ ration have Power by *Charter* or *Prescription* to remove him for a
“ reasonable Cause, that *will be per legem terræ* : but if they have *no*
“ such Power, he ought to be *convicted per judicium parium suorum*
“ &c. As if a Citizen or Freeman, be *attainted* of Forgery, or
“ Perjury, or Conspiracy, at the King's Suit &c ; or of any other
“ Crime whereby he is become infamous ; *upon such Attainder*,
“ they may remove him : So if he be *convicted* of any such Of-
“ fence which is against the *Duty* and *Trust* of his Freedom, and to
“ the *public Prejudice* of the City or Burrough whereof he is free,
“ and against his *Oath* ; (as if he burnt or defaced the Charters or
“ Evidences of the City or Burrough, or erased or corrupted them,
“ and is thereof *convicted and attainted* ;) These and the like are
“ good

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* P. 538. “ *good Causes to remove him. And *although they have lawful Authority either by Charter or Prescription, to remove any one from the Freedom, and that they have just Cause to remove him; yet if it appears by the Return, that they have proceeded against him, without hearing him answer to what was objected, or that he was not reasonably warned, such Removal is void and shall not bind the Party; quia quicumque aliquid statuerit parte inaudita altera æquum licet statuerit, haud æquus fuerit; and such Removal is against Justice and Right.*”

PREVIOUS CONVICTION was not a Circumstance at all necessary to the Judgment in that Cause: For there was *no sufficient Cause* of Amoval at all. There too, the actual Removal was by the *select Body*, (the Mayor and 9 of the Masters;) which can not be, except by Charter, By-Law, or Prescription.

There are three Sorts of Offences for which an Officer or Corporator may be discharged:

1st. Such as have *no immediate Relation to his Office*; but are in themselves of so *infamous* a Nature, as to render the Offender unfit to execute any public Franchise.

2d. Such as are *only* against his *Oath*, and the *Duty of his Office* as a Corporator; and amount to Breaches of the tacit Condition annexed to his Franchise or Office.

3d. The third Sort of Offence for which an Officer or Corporator may be displaced, is of a *mixed Nature*; as being an Offence *not only against the Duty of his Office, but also a Matter indictable at Common Law.*

The Distinction here taken, by my Lord Coke's Report of this second Resolution, seems to go to the Power of TRIAL, and *not* the Power of *Amotion*: And he seems to lay down, “ that where the Corporation has Power by Charter or Prescription, they may *try*, as well as remove; But where they have *no* such Power, there must be a *previous Conviction* upon an *Indictment*.” So that after an Indictment and Conviction at Common Law, *this* Authority admits, “ That the Power of Amotion is incident to EVERY Corporation.”

But it is now established, “ that *though* a Corporation has express Power of Amotion, Yet, for the *first* Sort of Offences, there must be a *previous Indictment and Conviction*.” And there is no Authority since *Bagg's Case*, which says that the Power of TRIAL as well as Amotion, for the *second* Sort of Offences, is not incident to every Corporation.

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* In Lord Bruce's Case, 2 Strange 819. The Court says, "The * P. 539.
" Modern Opinion has been, that a Power of Amotion is incident
" to the Corporation."

We All think this Modern Opinion is *right*. It is *necessary* to
the good Order and Government of Corporate Bodies, that there
should be *such a Power*, as much as the Power to make *By-Laws*.
Lord Coke says, * "There is a tacit Condition annexed to the * 11 Co. 98
" Franchise, which if he breaks, he may be disfranchised." ^{a.}

But where the Offence is *merely against his Duty as a Corporator*,
He can only be *tried* for it *by the Corporation*. Unless the Power is
incident, Franchises or Offices might be forfeited for Offences; and
yet there would be *no Means* to carry the Law into Execution.

Suppose a *By-Law* made "to give Power of Amotion for just
" Cause," such *By-Law* would be good. If so, a Corporation, by
Virtue of an incident Power, may raise to themselves Authority to
remove for just Cause, *though not expressly given* by Charter or Pre-
scription.

The Law of Corporations was not so well understood, and
settled, at the time of Bagg's Case, as it has been *since*. And
"Whether a Power of Amotion was incident to the Corporation,"
could be *no part* of the Question in Judgment in that Case, or ne-
cessary to the Determination of it. The Power of Amotion was
there exercised by the *select Body*; and the Cause was *insufficient*;
the Offence not being any of the three Kinds for which a Corporator
could be disfranchised. And the *Distinction* * there taken, as to the * 11 Co. 99.
Mode of Trial, is certainly *not Law*. For *though* the Corporation ^{a.}
has a Power of Amotion by *Charter or Prescription*, Yet, as to the
first Kind of Misbehaviours, which have *no* immediate Relation to
the Duty of an Office, but *only* make the Party infamous and unfit
to execute *any* public Franchise; THESE ought to be established
by a *previous Conviction* by a Jury, according to the Law of the
Land; (as in Cases of general Perjury, Forgery, or Libelling, &c.)

We therefore think the Court was well warranted in Lord Bruce's
Case, to *controvert* the Authority of the Proposition, *collected* from
what is said in Bagg's Case, "That there can be *no* Power of
" Amotion, *unless* given by Charter or Prescription:" And We
think that from the Reason of the Thing, from the Nature of
Corporations, and for the Sake of Order and Government, This
Power IS INCIDENT, as much as the Power of making By-Laws.

The second Objection upon this Point was, That the CAUSE is ^{2d. Objection^a}
not sufficient. ^{as to the Cause}
The ^{of Removal.}

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* P. 540. *The Plea sets forth two *stated* Days in the Year, *viz.* the 8th Day of *September* and *Michaelmas* Day for holding Great Courts at the *Moot-Hall*; and “that the Bailiffs may call a Great Court at any “*other Time.*” Great Courts were called on the 13th of *January*, the 15th of *April*, the 9th of *June*, and the 19th of *June* 1755. *Before the Holding of the said several Courts respectively, DUE Notice had been given of the Holding thereof respectively.* The Plea states likewise another Great Court on the 8th of *September* 1755; *due Notice* of the Holding thereof having there been previously given. And the Portmen removed did not attend these Courts; but *wilfully absented* themselves.

It is *not* stated “that the removed Portmen had **PERSONAL** “*Notice;*” And the Fact certainly is “that they had *not* :” For, where personal Notice *was* given to answer the Charge, the Plea alledges it precisely, and in a different Manner; Besides, if Truth would have warranted them, they might have * amended.

* The Defendant's Counsel had once proposed to move to amend; but gave it up, on finding their Facts insufficient to support it.

The Notice then of Holding these Great Courts must have been by some customary Signal, (as Sounding a Horn, or Tolling a Bell;) which the removed Portmen, in Fact, might know nothing of.

It is *not* alledged that the Portmen's Presence was *necessary* to the Holding the Great Court: On the contrary, the Prescription is alledged to be, “that the Bailiffs, Burgeffes and Commonalty, or *so* “*many* of them as *would be present*, have met, or assembled in “the *Moot-Hall.*”

It is *not* alledged particularly, that any *particular* Business was obstructed or defeated by the Portmen's Absence. The Plea alledges, “that they *wilfully absented* :” But that is a *Consequence of Law.* In pleading, they must alledge *Facts*, from which the Court may judge “Whether the Absence was wilful:” Upon which Facts, *Issues* may be taken, and tried by a Jury.

It is clear from the Plea, that the Portmen had *full Notice* of the **CHARGE** against them, and full Opportunity to have been heard: And therefore I lay all the Objections upon *that* Head, out of the Case. But, if the **CHARGE** was *in sufficient*, they had no Occasion to defend themselves.

This brings the whole to the Question, “Whether an Absence “from *four occasional* Great Courts, and *One upon a stated Day*, to “circumstanced, is a *sufficient* **CAUSE** of *Amotion.*”

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* There is *no Authority* which says it is. Though the *Usual Signal* * P. 541. is given for holding a Great Court, a Member may *not know* of it: Though he should know of it, he may be innocently absent, where he *thinks* his Presence not at all necessary, and where he does not *imagine* that any Business of Consequence is to be proposed.

In the Case of *Rex v. Mayor and Aldermen of Carlisle*, * The * Trin. 1720. Court argued in this Manner, That where an Alderman receives a 6 G. 1. B. R. Summons to appear at the *Common Council*, he might consider that [V. 1 Strange 385, 386.] his Presence was of no Consequence, and so stay away; And because He might innocently stay away from the Common Council, It was holden, that he should have had a *particular* Summons to meet the *Mayor and Aldermen*: And for want of *such* Summons, an Amotion by the Mayor and Aldermen, *at that Common Council*, was holden to be void.

There is not an Officer or Freeman in the Kingdom, (who is a Member of an Assembly,) that might not be removed or disfranchised, if this Doctrine was given Way to. At Times, *Every* Alderman, *Every* Common Council Man, not necessary to the Constitution of the Assembly, *knowingly omits attending*.

It is not necessary, and would be highly improper at present, to say *what kind* of Absence, or under *what Circumstances*, Non-Attendance may be a Cause of Forfeiture. It is sufficient that the Absence, with all the Circumstances alledged by *this Plea*, is *not* a Cause.

And We are All of Opinion that it is *not*.

The second General Point is, "Whether the Defendant was *duly elected*, by the *One* remaining Portman." But that is now become unnecessary. If it had been material, We are inclined to support the Election. *See Bayley's Rep. 213.* 2d. Point; (viz. The Validity of the Defendant's Election.)

However, It is not *now* necessary to enter into *that* Point; because We are, upon the *former* Point very clear "that the Cause of Amotion alledged and relied upon in the Plea, is not a *sufficient Cause* of Amotion."

JUDGMENT for the KING.

Rex

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* P. 542.

*Rex *vers.* Mary Mead.

A *Habeas Corpus* having issued in the last Vacation, at the Instance of *John Wilkes*, Esq; to bring up the Body of *Mary Wilkes* Wife of the said *John Wilkes*, and Daughter of the said *Mary Mead*, before Mr. Just. *Denison*; Mrs. *Mead* now brought Her into Court.

The Substance of the Return was, That her Husband, (having used her very ill,) *in Consideration* of a great Sum which She gave him out of her separate Estate, *consented* to her living alone, executed *Articles of Separation*, and *covenanted* (under a large Penalty) never to disturb Her or any Person with whom She should live. That she lived with Her Mother, at her *own* earnest Desire; and that this Writ of *Habeas Corpus* was taken out with a View of seizing Her by Force, or some other *bad Purpose*.

The COURT held this to be a formal *Renunciation* by the Husband, of his Marital Right to seize Her or force Her back to live with Him.

And they said that *any Attempt* of the Husband to seize Her by Force and Violence, would be a *Breach of the Peace*. They also declared that any Attempt made by the Husband, to molest Her in her *present Return from Westminster-Hall*, would be a *Contempt* of the Court. And they told the Lady, She was at full Liberty to go where, and to Whom, She pleased.

V. Rex v. Clarkson et al. 2 *Strange* 444, 445: Where the Court only took Care that the Young Lady should be under no illegal Restraint; and ordered a Tip-Staff to see Her safe Home, to her Guardian's, as had been formerly done in Lady *Harriot Berkeley's* Case.

Rex v. Captain Lister, Husband of Lady Rawlinson. 1 *Strange* 478.

Lady *Vane's* Case M. & H. 17 G. 2. B. R.

Rex v. Johnson, 1 *Strange* 579. H. 19 G. 2. 2 *Ld. Raym.* 1334. S. C. A Child was delivered to its proper Guardian, by the Court.

Rex v. Smith 2 *Strange* 982: Where indeed the Boy was only set at Liberty; And *Johnson's* Case was said to be carried too far.

Rex v. Griffith. H. 8 W. 3. B. R. And

Lady *Catherine Annesley's* Case.

Rex

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* Rex *vers.* Wright, Clerk.

* P. 543.

MR. *De Grey* shewed Cause against quashing the Indictment.

Mr. Serjeant *Hewitt* had moved to quash this Indictment charging the Defendant, That He, being a *Spiritual* Person, did TAKE to Farm several Lands &c; against the Statute of the 21 H. 8. c. 13. §. 1. For that *no Indictment* will lie, where a Statute creates a new Offence, and gives a particular Remedy, On Monday 13th February 1758 (upon Mr. *De Grey*'s then coming to shew Cause) the Serjeant proposed Three Objections: *viz.*

1st. An *Indictment* will not lie: It ought to be a Proceeding by *Action*, or by *Information*; (which are the two particular Methods of proceeding, specified and prescribed by this Statute.)

2d. *No Offence* is here charged. For OCCUPATION is the Offence for which the Act gives the Forfeiture: And here, *no Occupation* is charged; 'Tis only "That He did TAKE to Farm."

3d. It can not be prosecuted at the SESSIONS: For the Words of the Act are "in any of the KING's Courts."

First—An *Indictment* will not lie: Because the Statute creates the Offence, and has prescribed a particular Method of proceeding; and has no General Words. It enacts "that no *Spiritual* Person shall take to Farm &c; Upon Pain to forfeit 10 l, for every Month that He &c; The One Half of which Forfeiture to be to the King; the other Half, to every such Person that will sue for the same by Original Writ, Bill, or Plaint of Debt, or by any Information in any of the KING's Courts." 2 *Hawkins*, P. C. c. 25. §. 4. p. 211. is in Point "That where a Statute makes a new Offence, and appoints a particular Manner of proceeding, an Indictment will not lie." *Cro. Jac.* 643. 644. *Castle's Case* (1st Exception) is also most express in Point. 4 *Mod.* 144. *Rex & Regina v. Marriott*. S. P. *Rex v. Gluff*, Cases temp. Will. 3tij. B. R. 104. S. P. *

LORD MANSFIELD—Let us hear an Answer to this Objection first: For it seems a strong One; this being NO OFFENCE at COMMON-Law.

* But this was only quashed Nisi, (or a Rule to shew Cause,) on a Motion heard ex parte, only

Mr. *De Grey*, *contra*, proceeded to shew Cause on Behalf of the Prosecutor.

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* P. 544. * As to the 1st Objection—
1st.

2 *Hale's Hist. P. C. fo. 171.* is express, that if the Act does also contain a *prohibitory* Clause, the Offender may be indicted upon the prohibitory Clause, notwithstanding the Penalty.

Castle's Case Cro. Jac. 643. M. 20 J. 1. is incorrectly reported: as appears by 2 *Ro. Rep. 247. S. C.* Which says "That the Indictment was quashed for *some* of the Exceptions." Therefore *Castle's Case* is not an Authority in the present One: As it is only a partial Report, upon Memory; and has Mistakes in it (as 40 *l.* instead of 20 *l.* for one Instance.) 1 *Mod. 34. Crofton's Case* on 17 *C. 2. c. 2.* "To restrain Non-Conformist Ministers from inhabiting in Corporations," is most full and clear in Point to the contrary. 1 *Ventr. 63. S. C.* this very Objection was disallowed. 3 *Keb. 75. Rex v. Baker. Raym. 219. S. C.**

* The two
last are loose
Notes; and
adjourned.

2d. As to the 2d Objection. The *Occupation* is only to ascertain the Quantum of the Penalty; viz. 10 *l.* for every Month that he shall occupy: But the *TAKING to Farm*, is the Offence prohibited.

3d. As to the 3d Objection. The Indictment may be brought at the Sessions, and prosecuted there.

In answer to the Case cited in Support of the 1st Objection, of *Rex et Regina v. Marriott* according to 4 *Mod. 144. Ld. Ch. J. Holt* held *against* the other two Judges, *Dolben & Eyre*; and thought an Indictment the proper and reasonable Method. *Carthew 263. S. C. Rex v. Marriott*, refers to 4 *Mod. 144*, and observes that it was *against the Opinion* of Ld. Ch. J. *Holt*. 1 *Shower 398* is *S. C. Dominus Rex v. Marriott*; And the Reporter, (who Himself took the Objection,) says "That the Rule was pronounced by Ld. Ch. J. *Holt, consentientibus aliis*, thus—" *Let it stay.*"†

† But *Eyre*
added "It

"cannot be maintained, I doubt." Note also, that *Shower's* Report of what passed in this Case, is of *Tr. 4 W. & M.* (as likewise indeed is 4 *Mod. 144*;) But *Carthew's* is of *Hil. 4 W. & M.* which is two Terms later.

LORD MANSFIELD—I always took it that where *new created* Offences are only prohibited by the *general prohibitory* Clause of an Act of Parliament, an Indictment will lie: But where there is a prohibitory *particular Clause* specifying only *particular Remedies*, there *such particular Remedy* must be *pursued*. For otherwise the Defendant would be liable to a double Prosecution; One upon the general Prohibition, and the other upon the particular specific Remedy.

Therefore

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* Therefore, if there be any Doubt or Difficulty about this Mat- * P. 545.
ter, it will be better to enlarge the Rule, till next Term.

Mr. Just. DENISON laid down the Distinction thus; *viz.* That where an Offence is *not so at Common Law*, but *made an Offence* by Act of Parliament; yet an Indictment *will* lie, where there is a *substantive* prohibitory Clause in such Act of Parliament; (though there be afterwards a particular Provision, and a particular Remedy given:) But it is * otherwise, where the Act is *not Prohibitory*; but *only* inflicts the Forfeiture, and specifies the Remedy. †

* V. 8 H. H.
P. C. 171.
† V post. 803,
804, 805.

Mr. Just. Wilmot also took it so; and that this Point had been settled, later than any of the Cases cited. [In *Hil. 2 G. 2. B. R. Rex v. Pensacks*, and also in *Rex v. Malard*, the same Term, It was settled "that an Indictment will *not* lie, where an Act of Parliament *makes a new* Offence, and *prescribes a particular Method* " of Proceeding."]

He said He had always understood it to be a settled Distinction between a substantive independent Clause, and a Prohibition *sub modo*.

And, it would be hard to punish a man *twice* for the same *new* Offence.

Mr. Just. DENISON—*This Act* does not seem to me to give *the King* ALONE, a Power to prosecute *at all*, for this new Offence. However I shall give no Opinion now, as the Rule is enlarged.

On this Day, Serjeant *Hewitt* informed the Court that Mr. *De Grey* gave up this Matter.

LORD MANSFIELD—I do not at all wonder at it: I thought he would do so. I have looked into it: And there is nothing in it. That Case of *Crofton* has been *denied* many Times. Besides, Mr. *Clayton* has informed me of a Case that was determined upon the 3d Objection, "of it's being *at Sessions*."

RULE "To quash the Indictment," MADE ABSOLUTE.

Rex *vers.* Inhabitants of Bank-Newton.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 145.
pa. 455.

Thursday
13th April
1758.

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* P. 548.
Saturday,
15th April
1758.

* Rex *vers.* Peach et al'.

C A U S E was now shewn against an Information which had been moved for, at the *Application* of some Persons who now appeared to be a Parcel of infamous Cheats and Gamblers, against several others of the SAME *Profession and Character*; for a *Conspiracy to cheat* them out of about 900 *l.* at a Foot Race, by a most shameful Transaction of Fraud, Collusion, and Bribery, to induce the Racers to run Booty.

But it appearing most clearly to the Court, and it being too plain to be disputed by the Counsel for the Prosecutors themselves, that the Parties *complaining* and those *complained of*, were (*all of them alike*) a Parcel of infamous Cheats;—

The COURT unanimously refused to give the Complainants the EXTRAORDINARY *Assistance* of this Court, to enable them to attack their Bretheren in Iniquity, (who had probably, as the Court not without Reason suspected, quarrelled with them about the Division of their ill-gotten Spoils :) But they referred the Complainants to the *ordinary Remedy* of Action or Indictment; especially as the Facts alledged seemed to be within the Acts of Parliament made to prevent excessive Gaming. And, accordingly,

The RULE to shew Cause “Why there should not be an Information against them,” was DISCHARGED.

* P. 549.
Tuesday, 18th
April 1758.

* Carleton ex dimiss. Griffin *vers.* Griffin.

T H I S was a Special Case in Ejectment, brought upon the Demise of *John Griffin*, the Testator's Heir at Law. A Verdict had been given for the Plaintiff, subject to the Opinion of this Court, on the following Case: *John Griffin* (the Testator) being seized &c, and being &c, on the 2d of *May* 1752. wrote upon a *Sheet of Paper* with his own Hand as follows; *viz.* “Know all
“ Men, by these Presents, that I *John Griffin* &c, make the after-
“ mentioned, my last Will and Testament: And when it please
“ God to call me, I pray God direct my Relict. I make my pre-
“ sent Wife, my whole and sole Executrix of what it hath pleased
“ God to bless me with. I order my Son *John Griffin*, my Son by
“ my first Wife, 600 *l.* I have 600 *l.* in the three *per Cent.* An-
“ nuities: Which I order, not to be sold; but I order my Wife to
“ leave the Interest thereof to help to bring up my Daughter *La-*
“ *viner.*”

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“ *viner*. I likewise have two *Freehold* Houses in &c: [Which
“ are the Premises in question:] Which are to be for the same
“ Use, to help to bring up my Daughter *Laviner*, and *her Heirs*
“ *for ever*. My Daughter to take Possession of the Annuities at
“ her *Age of 25*. And if it please God my Daughter die before
“ her Mother, and unmarried and without a lawful Heir, then the
“ said two Houses to go to my Son *John* and his Heirs for ever.”

It concludes—“ I pray God to bless and direct my Wife and
“ Daughter and Son. And I die in Peace with all Mankind: And
“ I hope the Lord Jesus Christ will receive my Soul. And this
“ is my last Will; and not any other. 2d Day of *May* 1752.”

And he *subscribed* it, at the same Time when he wrote it: But {
there was *no Seal*, nor *Witness* to it.

And it was further stated, that on the 5th of *January* 1754.
He wrote on the *same Sheet of Paper*, the following Words, *viz.*
“ Memorandum—*Blackman-Street*, 5th *January* 1754: Whereas I
“ have laid out &c, on a Lighter called &c, and the Barge called
“ the *Lemon &c*; All these, and also all &c. at my Death, All
“ shall be at my present Wife *Mary*’s Disposal. And this not to
“ disannul any of the former Part made by me, the 2d of *May*
“ 1752: Except that my Wife shall not be liable to pay to my
“ Son *John &c*. Witness my Hand, *J. Griffin*, Sen.”

N. B. The Will was written on the first and second Sides of a
Sheet of Paper: And the Codicil was begun either upon the
* End of the Second or the Beginning of the Third, and writ- * P. 550.
ten upon the 3d Side. (Which Circumstance Lord *Mansfield*
thought material, though not decisive.)

And all this Codicil (or whatever it may be called,) related *only*
to the PERSONAL Estate; and *not at all*, to the REAL.

The Testator subscribed this in the Presence of Three Witnesses.
And then he took the said *Sheet of Paper* in his Hand, and de-
clared it to be his last Will and Testament, in the Presence of the
said 3 Witnesses; and then delivered it to them, and desired they
would attest and subscribe it in his Presence, and in the Presence of
each other: Which they accordingly did.

Upon this Special Case, Two Questions are reserved for the Opi-
nion of this Court: *viz.*

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1st. Whether the Republication of the said first Will (made in 1752,) upon the 5th of *January* 1754, be a *Publication* or *Republication* of his first Will, *within the Statute of Frauds*.

2d Question. Whether any Estate passed by the first Will, either to the *Daughter*, or to the *Mother*.

Mr. *Barnard* argued on Behalf of the Plaintiff, *John Griffin*, Heir at Law to the Testator.

This was no good Will, to pass Lands, beyond all Doubt, till the 5th of *January* 1754. And what happened then was *neither a Publication* nor a *Republication* sufficient to make it a good Will within the Statute of Frauds. Here are *two distinct Instruments*, at *two different Times*: The first, UNATTESTED, relating to the *Real Estate*; The second, *signed, published, and attested* according to the Statute of Frauds, relating to the *Personal*. But the first was *originally bad*; and could *not* be made good, by the subsequent Transaction. In support of which Assertion, He mentioned the Case upon Serjeant *Maynard's Will*, cited in *Comyns* 384. in the Case of *Acherley v. Vernon et al'*.

He likewise cited *Penpbrase v. Ld. Lansdown et al'*, *H. 11 Ann. Rot' lo. 620.* (on the Earl of *Bath's Will*;) which is also cited in the Case of *Acherley v. Vernon*, in *Comyns* 384; Where the first Will was only executed, not attested; And on making a Codicil to it, the Testator took the Codicil in one Hand, and the Will in the other, and said "This is my Will &c; And I publish this "Codicil as Part thereof;" and signed the Codicil in the Presence of the Witnesses who subscribed it in his Presence: It was holden
* P. 551. *to be no Republication of the Will. And this Case also proves that there can be no Republication *by Implication*, as it was there expressly determined: But the Will ought to be re-executed: or otherwise a Devise of Lands shall not be good.

Second Question. No Estate passes by this Will, *either* to the *Mother* or to the *Daughter*: But it descends to the Plaintiff *John Griffin*, as Heir at Law to the Testator.

The Statute of Uses does not operate; because there is no Transmutation of Estate: Without which, no Use can arise. Now here the Estate never passed out of the Heir at Law.

He made 3 Sub-divisions, under this second Question.

1st Sub-

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1st Subdivision. No Estate passes to the *Mother*. The Words of the Will must square with the Intent of the Testator. And here the Words do not extend to the Real Estate; because they are accompanied with the Word "*Executor*." *Precedents in Chancery* 471. *Piggot v. Penrice*. "I make my Niece Gore, *Executrix* of all my Goods, *Lands*, and *Chattels*." Her Lands of Inheritance did *not* pass: *Though* She had no Term, or Interest for Years, in any Lands whatsoever.

2d Subdivision (of the 2d Question.) Nor does any Estate pass by this Will to the *Daughter*. The Heir at Law shall not be disinherited by a strained Construction.

3d Subdivision (of the 2d Question.) The Statute of Uses cannot operate for want of a Transmutation of Estate: For here, it never passed out of the Heir at Law; and therefore no Use could arise. For no Use can arise without a Transmutation of Possession. To prove which Position he cited 1 *Inst.* 271. *b.* 6 *Rep.* 17. *b.* 18. *a.* *Sir Edward Cleve's*. 1 *Rep.* 176. *a. b.* 1 *Leon.* - *Moore* 569. So that no Use could here arise. And no Estate or Interest passed either to the Mother or Daughter under this Will.

Therefore He prayed Judgment for the Plaintiff.

Mr. *Burrell contra* for the Defendant.

1st Question. Whether the Publication of the second Instrument in the Manner as stated, is a Publication or *Republication* of the former, within the Statute.

2d Question. Whether ANY *Estate passes*, either to the *Mother*, or *Daughter*.

* First. The first Will indeed has not the Requisites appointed * P. 552. and required by the Statute of Frauds (29 C. 2. c. 3.) as essential to a Will of Lands. But that Statute has been always *liberally construed*, in Favour of Wills. 3 *Peere Wms. fo.* 252, 254. *Stonehouse et Ux' v. Sir John Evelyn*, (the last Point,) is a Proof of this: Where it was holden "That the Testatrix's *owning* her Hand was sufficient; though the Witness did not actually see her sign." This was a liberal Construction, as to the *Person signing*. So has been the Construction also as to the *Witnesses Attesting*. 2 *Chancery Cases* 109. *Anonymous*: A Will attested by 3 Witnesses, who were *not present together*, but subscribed *at several Times*, was decreed to be good. 2 *Salk.* 688. *Shires v. Glascock*. The Attestation was adjudged

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judged good, because the Testator *might* have seen the Witnesses subscribe, through a broken Window. So, 3 Lev. 1. *Lemayne v. Stanley*: As to the Testator's Signing his Name.

The Will was dated the 2d of *May* 1752, and was subscribed by the Testator; but was not then indeed, either witnessed or sealed. But it may be considered as intended to be afterwards executed.

Then in *January* 1754, He added a Codicil, on the *same* Sheet of Paper; took the said Sheet of Paper in his Hand; declared it to be his Will; and desired the Witnessees to attest it. This must be either a *Publication*, or a *Republication*. The very Case reported in *Comyns* 381. of *Acherley v. Vernon*, M. 10 G. 1. in Chancery, was a Determination, "That what Mr. *Vernon* there did was "a *Republication*; And that the Will and Codicil made *but One Will*:" And this Determination was affirmed in the House of Lords.

2d Question. Whether ANY *Estate* passed to either the *Mother* or the *Daughter* by this Will: (For if ANY *Estate* passed to *either*, the Plaintiff in Ejectment cannot recover.) 2 *Siderf.* 75. *Marret v. Sly*, is a Proof of great Allowances and Indulgence to the Testator's Manner of Expression. [See the 3d Point of that Case; where the Words were very false *English*.]

In the present Case, they took, a *Chattel-Interest* to the *Wife*; and an *Estate in Fee* to the *Daughter*: Or at least, they took *such* an *Estate* as is sufficient to preclude the Plaintiff; (whatever their *Estate* may, in Nicety of Law, be.)

* P. 553. As to the Words of the Will—The first Clause relates only to the Wife, as *Executrix*. “ I order *John Griffin* 600 *l.* I have 600 *l.* in &c. I leave the *Interest* &c, to help to bring up my *Daughter &c. I have two *Houses* &c: Which are to be to the same *Uses viz.* to help to bring up my Daughter &c.—He meant a *Chattel-Interest* to the *Mother*, for the *Benefit* of the Daughter, till She came to 25 Years of Age; and to the Daughter from her Age of 25.

The Remainder is devised to the Heir at Law, *after* the Death of the Daughter, unmarried and without lawful Heir, in the Life-time of her Mother. Therefore he shall *not* have it BEFORE that Event. *Carter* 26, 27. 3 *Rep.* 19. 6 *Rep.* 95. *Cro. Jac.* 75. *Equity Cases abridged* 179. Title *Devise*s, pl. 6. 2 *Peere Wms.* 194. *Newland v. Shephard*, (a strong Case;) Where a Devise of the Produce and Interest, in Trust for the Grand-Children, *till* 21, was decreed to pass the absolute Right and Property of both Real and Personal

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Personal Estate, to the Grand Children *after* that Age: For the Heir at Law was to have no Concern in it. So here, *John* the Son of the Testator, was to have no Concern in this Estate, *till* the Death of the Daughter.

Boreaston's Case, 3 Rep. 19. was holden to be a *vested* Remainder. So here, it is a *vested* Remainder in the *Daughter*. Therefore the Plaintiff can have no Demand. Wherefore he prayed that the *Possea* might be delivered to the Defendant.

Mr. *Barnard* in Reply—

1st. The Testator taking up the Paper in his Hand, said, “This is my last Will and Testament,” or “It is my last Will and Testament.” Which Act and Manner of Expression can only mean the *Instrument* that he had *then* signed in their Presence.

The present Codicil has no *Words of Confirmation*: Nor does it at all relate to *Land*; but *only* to *personal* Estate.

2d Point. Neither the Mother or Daughter took *any* Estate. The Words are, “I likewise have two Freehold Houses, which are to be &c, to help to bring up my Daughter *Laviner*, and her Heirs for ever &c. And if my Daughter dies unmarried and without lawful Heir, in the Life-time of her Mother, then to go to my Son *John* and his Heirs for ever.” As to the Mother, the Words are, “I make my Wife *Mary Griffin* Sole *Executrix* of all that it hath pleased God to bless me with.” And there is no Other Disposition, to the Mother.

An Estate shall never be taken by Implication, but from Necessity. And here is no Necessity.

* Lord MANSFIELD. The Case is accurately stated: For it is *not* * P. 554. stated to be either a *Will*, or a *Codicil*; but a SHEET OF PAPER written &c.

First. This is a Will of an illiterate Man, drawn by himself.

At first, In 1752, the Testator did not know that any Witnesses were necessary. In 1754, he had found that they were necessary. Then he makes a subsequent Disposition: Which is a *Memorandum* to be *added* to it. But he does not *call* this a *Codicil*; Nor does the Case *state* it to be *so*. He plainly considers the whole as *one entire* Disposition: And he expressly declares in the latter, “That he does not thereby mean to disannul any Part of his *former* Devise or Dispositions.”

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There is not a Tittle in the latter, that relates to the *Real Estate*. Therefore the only Intent of having the 3 *Witnesses*, was and must be to *authenticate the FORMER*.

The *Signing* the former, does *no Harm*; It makes it more solemn; but does *not hurt* it.

Then the Publication of it is *As of a Will*—He takes up the Sheet of Paper, and holding up the *said Sheet* of Paper, says “It is my Will.” And certainly, He did not mean a *Part* of it only; but the *Whole* of it. And he desires them to attest it. All this must relate to the Whole that was written on this Paper.

The Second Point is as plain *upon the bare reading*, as any Argument can make it.

There can be no Doubt of the Devise to the *Daughter*; whatever may be the Doubt of the Interest bequeathed to the *Mother*, till the Daughter comes of Age, for her Maintenance. But it is sufficient to bar the Plaintiff, that an Interest is given to *One* of them.

Therefore it is clear for the Defendant on both Points.

Mr. Just. DENISON concurred.—A Man may make his Will at different Times: And the Witnesses may attest at different Times. Here an illiterate Man makes and signs his Will; In which there is a Devise of Lands. To be sure, if He had died before Attestation, the Devise of the Land had not been valid. But afterwards, he adds more to it, on the *same* Sheet of Paper, and declares “That he does not thereby mean to disannul any Part of his former
* P. 555. “ *Devise and Disposition;” and signs it; and then takes the Sheet of Paper in his Hand, and declares it to be his last Will and Testament, in the Presence of 3 Witnesses; and desires the Witnesses to attest it: Which they do in his Presence &c.

This must be considered as One ENTIRE *Will*, made at different Times; and attested agreeable to the Statute of Frauds.

As to the Second POINT—It is not at all material, *What SORT* of Interest the Wife and Daughter, or either of them take under this Will: It is sufficient, that they take *some* Sort of Interest sufficient to preclude the Plaintiff's Demand. And *this* they certainly do.

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Mr. Just. WILMOT concurred with Lord *Mansfield* and Mr. Just. *Denison*. He also considered this as an *entire* Instrument, and as a Continuation of the former Act. 3

The Testator himself calls it a "*Memorandum*," (not a Codicil;) and declares "that he did not mean thereby to disannul any Part of " his *former* Devise or Dispositions." He only takes up the Consideration of something further that had occurred to him, since his writing the former: And it is not material, whether he does this, at two *Days*, or at two *YEARS* Distance from writing the former Part. A Man is not obliged to make his *whole* Will, *all at the same* Time.

And the Testator's having originally *signed* the former Part, is out of the Case, and makes no Difference: For it was not at all necessary or material to it, as a Will of *personal* Estate; and the Signing *alone*, unattended with the other Requisites, was not sufficient to render it affectual is a Will of *Land*: Therefore it was *totally immaterial*. And in *January* 1754, having written the Memorandum with his own Hand, on the *same* Sheet of Paper, He takes the said Sheet of Paper in his Hand, and declares "*It is his last Will and Testament*;" and desires them to *attest it as such*, in his Presence and in the Presence of each other:—Which they do. So that there can be no Sort of Doubt that this was a good *Publication* of this as *his Will*, within the Statute of Frauds.

As to the Second POINT—It is not at all material, *what Species* of Interest the Testator's Wife and Daughter or either of them may have in these Houses; provided that they or either of them have *such* an Interest as is sufficient to intitle them to the Possession of the Estate: For *if* they have *such an Interest* in them or in either of them, the Plaintiff cannot recover in Ejectment against them.

Now I should think that there is a *CHATTEL-Interest* in the *Mother*. But be that as it may, here is a Devise "to the Daughter *and her Heirs*," expressly; (however inaccurately this illiterate Testator has worded what accompanies it :) and therefore She seems to have a *Fee*; (though liable to be controlled by certain Events that may happen.) But thus much at least, is clear; *viz.* that his Son (*John Griffin*, the Plaintiff's Lessor,) was not to take, *TILL* the Testator's Daughter should be *dead without Issue*. * P. 556.

So that it is extremely clear and plain, that *either* the Mother or the Daughter have *such* an Interest as intitles them to the *Possession* of the Estate.

*Per * Cur.* unanimously,
Let the *POSTEA* be delivered to the DEFENDANT.

* Mr. Justice
Foster happened
to be absent.
Rex

Easter Term 31 Geo. 2.

Thursday, 20
April 1758.

Rex *vers.* Young and Pitts, Esquires.

A Motion was (on 10th May 1757) made for an Information against these two Justices of the Peace, for *arbitrarily, obstinately, and unreasonably* REFUSING TO GRANT A LICENCE to One Henry Day, to keep an Inn at Eversley; where it was alledged and sworn to be fit and proper and even necessary that there should be an *additional* One, (there being *One* there already;) and for which Occupation of keeping an Inn, this Man was (as these two Justices themselves had allowed on a former Occasion) a *proper* Person, they having before licensed Him to do so *at another Place*.

Upon this Original Motion being made at the Bar—

LORD MANSFIELD and Mr. Just. DENISON held, that notwithstanding this was a Matter left in a great Measure to the *Discretion* of the Justices, Yet if it appeared to the Court, from sufficient Circumstances laid before them, that their Conduct was influenced by *partial, opppressive, corrupt, or arbitrary* Views, instead of exercising a fair and candid Discretion, The Court might call upon them to *shew the REASONS* whereby they *guided their Discretion*: And therefore they were for granting the Rule to shew Cause, *as prayed*. But

Mr. Just. FOSTER (who happened to know the Place, and said there was *another* House of good Entertainment there already,) thought it sufficient to make a Rule upon the two Justices “To shew Cause why they should not GRANT *this Licence*.” And

LORD MANSFIELD and Mr. Just. DENISON concurred with Him, to express the Rule in that Manner, though the Substance was the
*P. 557. *same: because, if they did not shew sufficient Cause, the Consequence must be granting an Information.

Per Cur. unanimously—(Mr. Just. *Wilmot* being absent in Chancery.)

RULE upon these two Justices to shew Cause “*why they did NOT GRANT this Licence to this Henry Day*.”

On Monday 27th of June 1757. upon shewing Cause—The Justices, by their Affidavits, made *no Personal* Objections to Day; but thought the *Certificate insufficient*, because not signed by the Parson, Vicar or Curate.

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The COURT was of Opinion “ that the Certificate, being “ signed by 3 or 4 reputable and substantial House-keepers, &c, was “ sufficient.” But though the Justices had mistaken the Act, The Court cleared them from any wrong Motive.

But it being suggested “ that the present Parson and Churchwardens were ready to sign a Certificate in his Favour,” The Court enlarged the Rule to the first Day of next Term; with a View that He might be licensed at *Michaelmas*, if there should be *no other* Objection than what arose from the Certificate’s not being signed by the Parson and Churchwardens; and the Matter (which seemed to have raised great Heats, and was strongly supported by Sir *John Astley*, on the Part of *Day*,) be accommodated.

The RULE was accordingly enlarged in these Terms, *viz.* “ That “ the first Day of the next Term be farther given them, to shew “ Cause *why they have not granted, &c.*”

N. B. By 26 G. 2. c. 31. §. 1. It is enacted, That upon granting Licences by Justices of Peace, to any Person, to keep an Ale-house, Inn, &c. Every such Person *shall enter into a* RECOGNIZANCE in 10 *l.* with two sufficient Sureties, Each in 5 *l.*; or One sufficient Surety in 10 *l.*; under the usual Condition, “ *for maintaining of* GOOD ORDER AND RULE within the same.”

By §. 2. It is enacted, That *no Licence* to keep the same shall be granted to any Person NOT LICENSED the Year preceding; UNLESS such Person produce, at the General Meeting of the Justices in September, a CERTIFICATE under the Hands of the Parson, Vicar or Curate and the Major Part of the Churchwardens and Overseers, OR ELSE of 3 or 4 reputable and substantial Housekeepers and Inhabitants of the Parish or Place where such Ale-house is to be; setting forth “ That such Person is of good Fame, and of sober Life “ *and Conversation.” And it shall be mentioned in such Licence, * P. 558. “ That such Certificate was produced:” Otherwise such Licence shall be null and void.

By §. 3. No Licence shall intitle any Person to keep an Alehouse in any OTHER Place, than that in which it was FIRST kept, by Virtue of such Licence: And such Licence, with regard to ALL OTHER Places, shall be null and void.

On Friday 18th of November 1757. Mr. Norton again moved (and moved it as a new original Motion) for an INFORMATION against these two Justices of Peace; who, he said, had at their

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last general *September* Meeting for granting Licences, still PERSISTED *in refusing to grant this Licence*, notwithstanding what had already passed in this Court upon the same Subject and Occasion. Of this Fact he had Affidavits: and he also produced *fresh* and *circumstantial Affidavits*, as to the Merits; *viz.* the Necessity of such a Licence, and the Conduct of the Justices in their Opposition to it.

Lord MANSFIELD—What passed before was, “That the Court “ did *not* think any thing CRIMINALLY *imputable* to these “ Justices.” The Court then gave no Opinion as to *obliging* them to grant the Licence: But, on the contrary, expressly adjourned the Consideration of the Reasons of their Refusal.

This former Rule was only kept on Foot, *in order to obtain the MATERIAL END of it*: But as to the Behaviour of the Justices, with regard to the criminal Complaint against them, the Court discharged them from any Imputation of *Crime* or *arbitrary Intention to oppress* the Man.

The COURT therefore now made the *like Rule*, upon these FRESH *Affidavits*, as they had made upon the former, and ordered that both Rules should come on *together*.

Sir Richard Lloyd (on Saturday 11th of February 1758.) accordingly shewed Cause upon both Rules.

He observed that it was a Sort of Rule never before granted; and which He had known refused 25 Years ago. He said he never knew a Rule made upon Justices, to shew Cause “WHY *they did not grant a Licence,*” or *to enforce* them to do so; Unless there was some Charge of Corruption, Partiality, Bias, or other Imputation upon the Justices.

Lord MANSFIELD answered That the Affidavits upon which the Original Motion was made *did import such a Charge*;—And the Motion was *originally made upon that Foot*: And that the Rule was put into it's present Form, *out of TENDERNESS to these Gentlemen*, and *Regard* to the Fairness of their Character.

And they did indeed, upon the former Cause shewn, appear to be *free* from Blame, as to any *Criminal* Imputation.

But yet *if* they have *no reasonable Objection* to the Man, they OUGHT *to license* him: And *if* they have *any Reason*, they OUGHT *to GIVE* it. For *though* they have, it is true, a *Discretion* in these Cases,
yet

Easter Term 31 Geo. 2.

yet it must NOT *be permitted* to them to exercise an ARBITRARY and UNCONTROLLED Power over the *Rights* of other People, and in Cases where their *Livelihoods* are so essentially concerned.

Sir Richard Lloyd argued and insisted that the Legislature has made them the *SOLE Judges*, as being such who, from their Residence on the Spot, must *best know* the Persons and their Characters, and also the Circumstances of Time and Place. And the Legislature has even excluded Justices of Peace of *other Divisions*. And the Justices *thus intrusted* have a Right to *judge FOR THEMSELVES*: No Man can judge for another. And *this Power* is trusted to them, by the *Constitution*, by the *Legislature*.

It may be very *dangerous* to them, to be obliged to *give their Reasons publicly*: Though they may have *very sufficient* Ones to satisfy their *own Minds* and to direct their *own Judgment*.

And if they are thus intrusted, Why are they liable to be called to an Account by *any other Jurisdiction*; *unless* they act faultily and wilfully wrong? Indeed, if they do *wilfully* wrong, let them be punished: But where they act quite conscientiously, they are *not accountable to any Body*.

Now these Gentlemen say, and they SWEAR too, “that they “*really judge this House* to be an IMPROPER HOUSE; and *this Person* to be an IMPROPER PERSON; And that this is their *real and sincere Opinion*.”

This Question *affects ALL the Justices in England*: (I mean, *setting aside the IMPUTATION of wilful Misbehaviour*.)

Lord MANSFIELD—Most certainly. *No body doubts* of the Thing; *setting aside every Degree of Imputation*: It will not bear an Argument.

Sir Richard repeated the *Justices Reasons* for their Refusal; and concluded with INSISTING on their RIGHT to *judge for THEMSELVES*.

*Mr. Young, being in Court, spoke (very handsomly) in Exculpation of himself from any ill Intention; and declared very solemnly, “that He had acted according to his *real Sentiments*, “and the *best of his Judgment*.” * P. 560.

Lord MANSFIELD—It is a Matter of too much Consequence, and too much Length too (as I am obliged to go away,) to be determined now immediately; And it may as well stand over till next Term, as so little Time of this Term is left.

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On *Thursday* 13th of *April* 1758. This Case being mentioned again—Lord MANSFIELD proposed *altering the Rule*, by making it “To shew Cause why there should not be an INFORMATION against them:” For so He said, it was *originally moved*, and this was the *true* and *proper* Foot to argue it upon; (And Mr. Norton declared that he proposed to argue it upon *that* Foot;)—Though in *Tenderness* to the Justices, and lest the Country should run away with a Notion of their being under a *Criminal* Charge, it had been put into the Form that it at present stands in. (*V. ante p. 557.*) And Mr. Nares, Counsel for the two Justices, not opposing or objecting to this Alteration— The Rule was *altered accordingly*.

And now this Affair coming on again, (for the last Time;)

Lord MANSFIELD again declared that the Argument ought to be taken up upon the Foot of *Criminality* in the Justices: For it was so *originally moved*; it was the *proper Nature* of the Question; it was so understood by every Body; and so *meant by the Court*. For, (as He again explicitly declared,) there was no Pretence, upon any *other* Foot, to make a Rule upon the Justices, who have a *Discretionary* Jurisdiction given them by the Law. But though * *Discretion* does mean, (and can mean Nothing else but) *Exercising the best of their Judgment* upon the Occasion that calls for it; Yet if this Discretion be *wilfully abused*, it is *criminal*, and ought to be under the Control of this Court.

* V. post.
a farther
Definition of
Discretion.

Mr. Nares and Mr. *Thurlow*, for the Defendants thereupon argued strongly and very largely, that the Justices had been so far from acting *criminally*, that they had acted *rightly, properly* and *honestly*: And they hinted that the Court had *already* exculpated them from any *Criminality* of Behaviour.

And the Legislature have left this Jurisdiction *so absolutely* to the Justices of the *particular Division*, that *no Appeal* will lie from their Determination; as appears by 1 *Salk.* 45: which is expressly so, and is cited in 2 *Strange* 881, as a Proof of this Position.

* P. 561. * Neither will any *Mandamus* lie to the Justices, to oblige them to grant the Licence; even though they should appear to have refused it upon Reasons which may be looked upon as very suspicious at least, if not very improper. 2 *Strange* 881. (*Rex v. Justices of Worcester*) *Giles's Case*.

Nor will the Court grant an *Information*, for refusing to grant a Licence. *Rex v. Justices of Nottingham*, where, *they said*, an *Information* was *denied*.

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But *Per Cur.* That Case was an *Abuse*, a *gross Abuse*, of their Discretion: And the Information was therefore *granted*. And so it was in the Case of *Bridgewater*, upon the same Foot, of *Abuse* of the Discretion intrusted to them.

The Counsel for the two Justices next observed that *Day's* having for many Years had a Licence to keep a public House in *another* Parish, was quite an *immaterial* Circumstance: For, by 26 G. 2. c. 31. § 3. such Licence was *absolutely null and void*, with regard to all OTHER Places. [*V. ante* 558.]

The Affidavits on both Sides being then All distinctly read, It appeared (upon the whole Matter) that these two Justices had acted in this Affair, with Fairness, Impartiality, Candor, and Justice; that they *really and sincerely thought* both the *Man* and the *House* IMPROPER *to be licensed*; and that they had *very good and sufficient Reasons* for so thinking and determining.

Whereupon, their Counsel concluded with praying that the Rules made upon them might be discharged with *full Costs*.

Contra for the Prosecutors.

The main Tendency of the Arguments of the Counsel *in Support* of these Rules, was, to shew that the Refusal to grant this Licence to *Day*, arose from PARTIALITY to Mr. *Barker* the Lord of the Manor, who was the Proprietor (the Landlord) of the *other* publick House already established in the Parish.

LORD MANSFIELD once more declared "That this Court had
" NO *Power* or Claim, to *review the Reasons* of Justices of Peace,
" upon which they form their Judgments in granting Licences;
" by way of APPEAL from their JUDGMENTS, or OVER-RULING
" *the DISCRETION intrusted to them.*"

But if it CLEARLY *appears* that the Justices have been *partially, maliciously, or corruptly* influenced in the EXERCISE of this Discretion, and have (consequently) ABUSED *the Trust* reposed in them, * P. 562. they are liable to Prosecution by *Indictment* or *Information*; or even, possibly, by *Action*, if the Malice be very gross and injurious.

If their JUDGMENT *is wrong*, yet their HEART and INTENTION *pure*, God forbid that they should be punished! And he declared that He should always lean towards *favouring them*; unless Partiality, Corruption, or Malice shall *clearly* appear.

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The present Question therefore only is, “Whether these Gentlemen have been guilty of any *Partiality* or *Malice*, (for Corruption is not pretended,) in the Refusal of this Licence.”

Then He went minutely and accurately through All the Particulars both of the Charge and of the Defence. And he thought that upon the first and original Motion, the Justices appeared to have been *mistaken* in the *Grounds* of their Refusal; in that they fixed it upon the want of the Ministers and Churchwardens signing; which *they judged* to be *requisite* by the 26 G. 2. c. 31. (when it was *not*.) However, in this, they were *not criminal*; though they were *mistaken*. And at *that* Time, they had *no* Personal Objection to *Day*. And therefore it was (from all that *then* appeared) reasonable to expect that, upon enlarging the Rule, they *would* at their next Meeting *grant* the Licence; which they had before refused, *upon a Mistake*, of which they were subsequently informed.

But *SINCE this*, and antecedent to such next Meeting, there are come out *several strong* PERSONAL *Objections* to *DAY himself*: (Which these Justices were the PROPER *Judges* of :) Namely, His keeping and having long kept a House for publicly retailing Ale Wine and Spirituous Liquors without being licensed thereto; His having been twice convicted of selling Spirituous Liquors, without a Licence; His suffering a Day-Labourer to drink a whole Day in his House, in Harvest-time, and afterterwards vindicating it; His having been charged with a Fraud, upon Oath; Besides an Allegation in One of the Affidavits, “That two notorious Highway-men and Robbers appeared at least to have used his House as a Public House, if they enjoyed no other and more particular kind of Harbour and Protection in it.”

And in respect to the *House*, the Justices now swear that they are clearly of *Opinion* “That *One* House is sufficient.” And they likewise clear themselves, by the most solemn Assertions in their Affidavits, of all *Criminal* Imputation.

* P. 563. *Therefore He concluded with declaring it as his Opinion, that there was *NO sufficient Foundation* for a CRIMINAL Charge against these Justices.

Mr. Just. DENISON concurred.

He also expressly *allowed the Discretionary* Power of the Justices in granting Licences; *without Appeal* from their Judgments, or having their *just* and *honest* Reasons *reviewed* by *any* Body. But yet
2 an

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an *improper and unjust Exercise* of the Discretion, He said, *ought* to be under Control.

But it must be a *clear and APPARENT Partiality*, or *wilful Misbehaviour*, to induce the Court to grant an Information: *Not* a mere Error in *Judgment*. And here is certainly *no clear and apparent Partiality*, or *wilful Misbehaviour*, in these Justices.

Therefore the Rules ought to be discharged.

Mr. Just. FOSTER concurred in the *general Principles* before laid down: And He thought that there was no Evidence of Partiality, Malice or Corruption, in the present Case.

He declared *against increasing* the Number of public Houses; and gave several strong Reasons against it: And therefore He thought the Justices far from being to blame, in having come to a Resolution "*not* to increase them." And He was satisfied that the Justices had Reason sufficient to refuse this *particular* Licence; both with regard to the *House*, and also with regard to the *Man* refused.

Mr. Just. WILMOT concurred.

He was very explicit, that the *SOLE Discretion* of granting Licences, is in the *JUSTICES of the Division*: And He moreover gave very good Reasons why it should be so.

And this Point (he observed,) is admitted at the Bar.

Then the *Sole Discretion being in them*, the *RULE* is invariable, "that this Court will *never* interpose to punish a Justice of Peace for a mere *Error in JUDGMENT*."

Therefore, even supposing them to have been *mistaken* from Beginning to End, yet there is no ground from any of the Affidavits, to infer any *Partiality, Malice, or Corruption*: There is not the *least *Fact*, whereupon sufficiently to *FOUND* any such Apprehension and Belief even in the Complainants; And the Justices themselves do most *solemnly* *DENY* it in *their* Affidavits. * P. 564.

Per Cur. Both *RULES* *DISCHARGED*, with *Costs*.

LORD MANSFIELD—There are *two* distinct Reasons why We should *give* *COSTS*: One, with regard to the Person *complaining*; The Other, with regard to the Persons *complained of*. For it appears, upon the Affidavits, that *Day* (the Person complaining)

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complaining) has *persevered* in keeping this House WITHOUT a *Licence*: And it now appears that the Justices who are complained of, have acted both *honestly* and *legally* in *refusing* to grant it, in a Place where there was *already* a Sufficiency.

V. post, pa. 653. Rex v. Athay Esq; M. 1758. 32 G. 2. B. R. a like Point: And Rex v. Williams, Rex v. Davis, and Rex v. Baylis et al'; all three in P. 1762, 2 G. 3. post, pa.—

Saturday, 22
April 1758.

Rex *vers.* Inhabitants of Macclesfield.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 146. pa. 458.

Monday 24th
April, 1758.

* Rex *vers.* Episcopum Dunelmensem.

* P. 567.

MR. *Willes*, on Behalf of Dr. *Sterne*, Prebendary of the second Stall in the Cathedral Church of *Durham*, moved for a MANDAMUS to the Bishop, commanding Him to exercise his VISITATORIAL Power over the *Temporalities* of that Church, in the Instance herein after mentioned: (In which Dr. *Sterne* had applied to the Bishop to exercise it; Who refused to do so, unless under the Authority of this Court.)

And He alledged that such Visitatorial Power is given to the Bishop, by the 40th of their Statutes.

And there is no other Method of trying this Question, but before the Bishop as Visitor.

Mr. *Norton*, for the Bishop, said that the Bishop was not satisfied that He HAD *such a Power*: And therefore He proposed that the Dean and Chapter should be called in, to litigate it.

N. B. The Merits of the Question were “Whether the *Successor*-Prebendary (Dr. *Sterne*) had a Right to 2 $\frac{1}{2}$ Years Profits accruing during the *Vacancy of the Stall*, from the Death of Dr. *Benson*, Bishop of *Gloucester*, (the last preceding Prebendary:) Which intermediate Profits the *Other* Prebendaries had received, and *divided* amongst them.”

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LORD MANSFIELD thought that an *Action at Law* was the proper Method; and instanced the Case of *Dr. Young v. Dr. Lynch*, P. 26 G. 2. 1753. B. R; and mentioned likewise Canon Seagar's Case (who was a Canon of the Church of *Salisbury*) in Chancery.

“ Whether the *Bishop* can have a *Jurisdiction* to determine this Point; Or Whether *Matters of Property* in Cathedrals can be determined otherwise than according to the Course of the Law of the Land, is a great Question.” And certainly, the Dean and Chapter must have an Opportunity to shew Cause against a *Mandamus* being issued to the Bishop, to exercise such a Jurisdiction.

* But in this particular Case, the Question must be litigated, not only with Members of the Body; but with *Executors and Administrators* of deceased Prebendaries: Over Whom, the Bishop (supposing Him Visitor, and as Visitor to have Cognizance of such a Case,) can have no Power. Which alone is decisive against his Jurisdiction in this Question. * P. 568.

Mr. Willes, perceiving the Court so strongly against him, agreed to take nothing by his Motion.

Rex *vers.* Peters, et al' :

O R

Cavil *vers.* Burnaford et al'.

MR. HUSSEY shewed Cause against the issuing of a *Mandamus*.

A Motion had been made by Mr. Whitaker (on 13th February 1758) for a *Mandamus* to be directed to the Defendant John Peters, the County-Clerk, (who was the Steward of the Court,) and also to the free Suitors of the County-Court of the County of Cornwall, commanding them to proceed to final Judgment in a certain Cause by Plaintiff in Replevin, commenced in the said County-Court, between John Cavil Plaintiff, and John Burnaford, Anthony Pomery, and Nicholas Pelyne, Defendants; in which Cause the said John Cavil obtained an *Interlocutory Judgment* in the said County-Court.

The Case, in short was,—That Burnaford distrained Cavil, for Rent; Cavil brought a Replevin, in the County-Court of Cornwall; AN INTERLOCUTORY JUDGMENT was regularly entered; And a

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Writ of Inquiry of Damages executed thereupon ; and 2 *d.* assessed for Damages, and 5 *s.* for Costs, and so much more Costs as the Court should allow. This *Inquisition* was set aside for *Irregularity*, (*viz.* *Want of Notice* of executing the Writ of Inquiry.)

The Defendant's Advocate there then moved "To *set aside* the said (regular) INTERLOCUTORY JUDGMENT *itself*; UPON the Defendant's paying the Costs of entering it, (to be taxed by the Steward,) and on avowing *issuably*:" And afterwards, on a subsequent motion "to make such Rule absolute," it being urged by the other Side, "that that Court had no Power to set aside a *regular* Judgment," the Judge took time to advise. At a future Court, after Inquiry from ancient Practisers in the said Court, and being informed that it had been the *constant Custom and Usage* of it

* P. 569. " * TO SET ASIDE *interlocutory* Judgments, any time before executing Writs of Inquiry therein, ON the Defendant's paying the Costs of entering the same Judgments, and pleading *issuably* to such Actions *instanter*;" and after having fully considered the Affair in all its Circumstances; and apprehending it to be agreeable to the Practice of this Court; He declared his Opinion "That it *ought to be set aside*, and the Defendant's Avowry received, they having paid the Costs, at the Time of filing it *de benè esse*," (which had been done in the Interim :) And accordingly, He made a Rule, thus—"Cavil v. Burnaford et al'. It is Ordered, &c, That the interlocutory Judgment entered in this Cause *be SET ASIDE*, on Payment of Costs taxed; And that the Avowry filed in this Cause, *de benè esse*, last Court-Day, be now, on Consideration of the Court, made absolute: And therefore Rule for the Plaintiff in Replevin to Plead in Bar to the Avowry."

And the Judge of this inferior Court swears "That He acted with the utmost Impartiality in the Affair, and according to the best of his Judgment and Understanding; And, He apprehends and believes, according to the CONSTANT USAGE AND PRACTICE established and observed in the said Court."

Mr. Whitaker's Motion was grounded upon the *Inferior Judge's* having exceeded his Authority. And He had cited 2 *Strange* 823. *Fox v. Glass*, H. 1728. 2 G. 2. as the *first* Time that even this Court had set aside REGULAR Judgments; and 1 *Strange* 392. *Bayly v. Boorne*, M. 7 G. 2 where they doubted of an *Inferior Judge's* having such a Power.

On Friday last, (21st April 1758,) Mr. Hussy shewed Cause Why this *Mandamus* should not issue. And He made the two following Questions.

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1st. Whether the Judge or Steward of an *inferior Court* has a Right to SET ASIDE *interlocutory Judgments* REGULARLY obtained :

2d. Whether in *this particular Case*, the Steward of *this inferior Court* had a Right to do as he had done, and as is the Practice of *that inferior Court*.

As to the 1st Question—He agreed they *cannot grant new Trials*. 1 *Salk.* 201. *Regina v. Hill et al'*, and 2 *Salk.* 650. the Case of *Bristol* (which is S. C.) *Brooke v. Ewers et al'*, 1 *Strange* 113. S. P. A *Mandamus* issued to a Judge of an inferior Court, “to give Judgment :” *though* he had granted a new Trial. Therefore He would not contend that an inferior Court has a Right to set aside a *regular Judgment*, UNLESS it be to let in the *Merits*.

* But they *may* do it in order to TRY THE MERITS. 2 *Salk.* 650. * P. 570. In the Case of the Mayor and Aldermen of *Bristol*, It was holden, “That an *inferior Court* could not grant a *new Trial*.” However, it was long since done by *this Court* : And they would also *formerly* set aside *regular Judgments*, on putting the Plaintiff in as good Condition as before. And it does not appear how the Court came to leave it off; as Sir *John Strange* says (in the Case of *Fox v. Glass*) that they had done.

And it seems right in itself, and agreeable to natural Justice, to permit inferior Courts to set aside regular *interlocutory Judgments*, in Order to let in a Trial of the MERITS. Indeed it is reasonable, *not* to permit them to set aside the *Verdicts of JURIES* : Which is an exceedingly different Case from a Judgment by Default.

As to the 2d Question—In the *present Case*, the Steward acted rightly and reasonably, upon the Circumstances attending it.

Mr. *Whitaker*, *contra*, for the *Mandamus*.

The Letting in the Trial of the MERITS, makes *no Difference*. I say that an Inferior Court can *not* set aside a *regular Judgment* after they have *once exercised their Authority*. In 1 *Strange* 392. *Baily v. Boorne*, M. 7 G. 2. B. R. The Court thought it a Question that deserved Consideration, “Whether the Judge of an Inferior Court *could* do it.” And there is no more Reason Why they should have *this Power*, than that of setting aside *Verdicts*. They have no such *Discretion*. “*Discretion*” is another Word for “*Arbitrary Will*.”

LORD

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LORD MANSFIELD denied this Interpretation of the Term *Discretion*; and referred to what was said (a few Days ago) in the Case of *Rex v. Young and Pits, V. ante p. 560. 561, and 562.*) And he said that DISCRETIO is, as Lord Coke says, “discernere *per Legem* quid sit justum.”

To which Observation, Mr. Just. WILMOT desired to add another, from 5 Co. 100. *a. Rooke's Case*: “DISCRETION is a Science and Understanding of distinguishing and discerning “between Falsehood and Truth, &c &c; and NOT to do according to *arbitrary Will* and *private Affection*.”

Mr. WHITAKER—But these Inferior Judges have *no Sort* of discretionary Power of *any Kind*.

LORD MANSFIELD—That Case of *Baily v. Boorne*, in 1 Strange 392, only says “That it was a Question that deserved *Consideration*.”

* P. 571. *But there is *no Precedent or Authority* to the contrary of their having such a Power.

And it seems a Power *necessary to the Exercise of Judicature*; And is very different from the Case of setting aside VERDICTS.—*This Power to set aside interlocutory Judgments, seems incident to Justice.*

* Mr. Just. Foster was absent

However, both Lord Mansfield and the other * two Judges, thought it might not be amiss to look into it. And—

[† It was in Hil. 1754. 27. and P. 1755. 28 G. 2. *Eastwell v. Livermore: V. post. 572.*] Mr. Just. DENISON intimated as if there was something of this Sort before the Court. in † P. 28 G. 2. B. R.

CUR' *advifare vult.*

And now Lord Mansfield delivered the Opinion of the Court; having first desired Mr. HUSSEY to state the Case, for the Sake of the Students: (For He took this Opportunity of observing and declaring “that Nothing *misleads* so much as reporting the Determination of “Courts of Justice, without having a sufficient and *correct State of* “*the Case* ;” which, He said, was only an *ignis fatuus*, leading People into Error and Mistake.)

Here, the Question, upon the *true State* of the Case, (which *V. ante, p. 568.*) appears to be “Whether an INFERIOR Court has “POWER to SET ASIDE a REGULAR INTERLOCUTORY Judgment, in ORDER to let in the Trial of the MERITS.”

And

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And We are All of Us of Opinion, "That they HAVE such a Power." There is no *Authority* nor even *Dictum*, to the contrary: Nor is there any *Reason* why they should not have such a Power; which is *incident* to the Doing of *Justice*.

Indeed there are Authorities which say, "That an Inferior Court can not grant a NEW TRIAL, or set aside the VERDICT of a JURY, but for Irregularity."

But there may be many Reasons Why they may be permitted to set aside an *interlocutory* Judgment, in order to let in the *Merits*; which Reasons will not hold so far as to make it allowable for them to set aside the *Verdict of a Jury*: (One of which Reasons may be "that no *Attaint* lies upon a Verdict given in an *inferior* Court.") And indeed the Setting aside a *Verdict of a Jury*, is too great a Power to be intrusted to an *inferior* Jurisdiction. Yet

We are, All of Us, clearly of Opinion "That they may set aside regular INTERLOCUTORY Judgments, in order to let in the *Merits*;" both upon the *Reason* of the Thing, and for the Convenience attending it. * P. 572.

That Case in 1 *Strange* 392. of *Baily v. Boorne* (*V. ante p. 570.*) proves nothing at all against this. And in 1 *Strange* 499. *Jewell v. Hill*, H. 8 G. 1. An inferior Judge set aside even a *Verdict*, for *Irregularity*, (or rather for *Surprise* :) Which this Court allowed he might do.

Mr. JUST. DENISON added, that in the Case of *Eastwell v. Livermore*, (*V. ante p. 571. in Margine*) It seemed to be understood and agreed at the Bar, "That an inferior Court could not set aside a Verdict, * AT ALL:" But He finds that He has written a Note at the Bottom of that Case, importing that He Himself thought that it ought not to be taken for granted, so generally as this is laid down, "That they cannot do it * at all;" For that He thought that an inferior Court may set aside even a Verdict, for IRREGULARITY; though they are not to be trusted with a Power of Setting aside Verdicts, upon the MERITS.

* It is true that there was no Distinction expressed, in the Discussion of that Case. But no Irregularity was there pretended: nor any

other Reason attempted to be given for setting aside that Verdict, but because it was a hard One, and such as ought to be set aside.

And this, He said, was certainly the RIGHT Distinction; viz. That they may set aside even Verdicts, for *Irregularity*; but not upon the *Merits*.

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Wherefore *Per Cur.* unanimously,

Let the RULE made “ That *John Peters* the County-Clerk,
“ and the Free Suitors of the County-Court, should shew
“ Cause why a *Mandamus* should not issue, directed to them,
“ commanding them to proceed to final Judgment in a cer-
“ tain Cause by Plaint in Replevin commenced in the said
“ County-Court, between *John Cavil*, Plaintiff, and *John*
“ *Burnaford*, *Anthony Pomery*, and *Nicholas Pelyne*, Defen-
“ dants, in which said Cause the said *John Cavil* obtained an
“ interlocutory Judgment in the said County-Court, on the
“ 12th Day of *October* last ;”—*be* DISCHARGED.

RULE DISCHARGED.

* P. 573. * *Rex vers.* Collingwood Foster, Edward Gallon, George
Selby, and Thomas Mills.

FOUR Rules having been made absolute, (last *Tuesday*,) for
four Informations in Nature of *Quo Warranto*, against these 4
Defendants, respectively, “ to shew by what Authority they claimed
“ to be Chamberlains of *Alnwick* in the County of *Northumber-*
“ *land*”—

Sir *Richard Lloyd*, on Behalf of the Defendants, moved (on
Saturday last,) That there should be ONLY *One* Information against
All the four Defendants, instead of FOUR *distinct and separate* In-
formations.

Which The COURT thought very *reasonable*, upon the 4th Sec-
tion of 9 *Ann. c. 20.* which runs thus—“ And if it shall appear
“ to the said respective Courts, That the *several Rights* of *divers*
“ Persons, to the said Offices or Franchises, *may properly* be deter-
“ mined on ONE Information, it shall and may be lawful for the
“ said respective Courts to give *Leave* to exhibit ONE such Infor-
“ mation against SEVERAL Persons, in order to try their *respective*
“ Rights to such Offices or Franchises.”

Mr. *Norton contra*, for the Prosecution, urged that though the
Court *might* indeed give *Leave* for this joining several Persons
Rights in One Information, yet they *would not do so*, if the Prose-
cutor judged that it might be *inconvenient* to him.

Sir

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Sir *Richard* replied that the Court *would* direct it, unless it was *shewn* to be attended with Inconvenience.

It ended in Mr. *Norton's* taking Time to consult his Client.

Which having done, He (this Day) said his Client had no Objection to it; provided no Exception should be afterwards taken to such Union of the several Causes.

CUR. The Defendants cannot object to it, when the Court judge it to be proper.

* *Challoner vers. Walker.*

* P. 574.

Tuesday, 25th
April 1758.

AN Action of Debt on a Bond, Conditioned as follows; after first reciting That Whereas *G. Needham* being seised in Fee &c, died intestate &c, leaving a Son *James* &c and *Anne Needham* his Widow, then living; And whereas *James* &c were about to sell the Estate; And also reciting the said *Anne's* being married to a second Husband *David Kinneir*; And reciting a Doubt having arisen concerning her Right to Dower; And whereas it was agreed that 30 l. Part of the Purchase-Money of the Estate, should be left in the Defendant's Hands, in order to indemnify &c from the said Claim &c, And all Costs Charges &c: Then the Condition is, that if the Defendant and one *Coulson* or their Heirs Executors and Administrators should indemnify the Plaintiff from all and all Manner of Claim of Dower that might be made BY the said *Anne Needham*, as Widow of the said *G. Needham*, out of the said Premises; and of and from all Costs Charges Damages Demands &c, that may arise or happen by or from such Claim &c; then &c.

Plea. That he has indemnified the Plaintiff.

Replication—That *David Kinneir* married the Widow; and exhibited a Bill in Chancery for Arrears of Dower—He answered the Bill; and expended 8 l. 10 s. for Costs in the said Suit.

To this Replication, the Defendant demurs specially; and shews several Causes of Demurrer; viz.

1st. The Replication is *not a direct answer* to the Plea.

2d. *No Issue can be taken* upon this Replication.

3d.

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3d. *No Breach* of Condition is *sufficiently alledged* in this Replication.

Mr. *Altam* for the Defendant, made two Points :

1st Point. The Condition only extends to a Claim of Dower to be made by *Anne Needham* in her *LIFE-time*.

2d. The Plaintiff has *brought his Action too soon* : He ought to have stayed *till* the Suit in Chancery had *been determined*.

First Point—Conditions shall be construed *favourably* for *Obligors*. 1 *Saund.* 66. *Butler v. Wigge*—It is so declared by the Court.
* P. 575. * *Cro. Eliz.* 396. *Greningham v. Ewer*—There the same Rule was laid down. 2 *Saund.* 411. *Ld. Arlington v. Merricke*.

And a Condition shall *not be extended* further than the *Words* of it. 1 *Ro. Abr.* 489. 1 *Ro. Abr.* 426. *pl.* 6. 1 *Strange* 227. *Stibbs v. Clough*. 1 *Lutw.* 536. *Wilson v. Constable*.

Second Point—His Expence will be *repaid him*, if the Bill should be dismissed with Costs. It is not like the Payment of a Debt admitted to be due : *This Condition* is only to indemnify against a *Claim*.

Mr. *Asburst* for the Plaintiff.

1st Point. 1st. This Breach is within the *Words* and *Letter* of the Condition.

2d. It is clearly within the *Meaning* of it.

First—*Asburst* and *Walker* purchased the Estate. The Widow had *claimed* Dower. The Indemnification is against any *Claim* of Dower that should be made by her. And the Suit is brought upon that *Claim*.

Secondly—But it is clearly within the *Intent* of the Condition. And Mr. *Altam's* Cases will not hold now : Because Courts of Equity will now relieve against the Penalty. And Courts of Law therefore are less strict than formerly. *M.* 29 *G.* 2. *B. R. Drummond et Ux' Administratrix of Asb Esq; v. Duke of Bolton*.

In the present Case, there was a Treaty for the Sale of the Estate : And a Bond (instead of incumbering the Deed with a Covenant)

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Covenant) to indemnify against all *Claim* of Dower, and all *Expences Costs* and *Damages* arising from any such *Claim*. Mr. *Altham's* Cases of 1 *Ro. Abr.* 326, &c, are not applicable to the present Case.

2d Point—The Plaintiff is certainly *already* damnified: And he is *not* obliged to *wait* for Reimbursement, *till* a Chancery-Suit shall be determined. Nor can he have *Interest* for his Money, if he was to wait till then. 1 *Ventr.* 33, 36 & 78. *King v. Atkins.*

Mr. *Altham* in Reply—

1 Point. The Condition is “To save him harmless from the Dower or Thirds that are or shall be claimed by *Anne Needham*, and from all Costs Charges Damages &c arising &c therefrom:” That is, from *her* Claim.

* P. 576.

*2d Point—In 1 *Ventr.* 35, 36, 78. The Shilling was an absolute Damnification: For there no Costs were recoverable, upon the *Scire facias* issued against *King*, to which He was obliged to appear.

LORD MANSFIELD—This is the plainest Case that can come before a Court. He stated the Pleadings. And He treated the Objections, and the Cases cited in Support of them, (and thus applied to them,) as quite frivolous and nugatory; And, without the least Doubt or Difficulty, over-ruled them. For the Case is most clearly *within* the Words and Meaning of the Condition: And the Obligee has been *already* damnified, and therefore has a Right to be *immediately* reimbursed.

Mr. Just. DENISON concurred in both. And He added that here was 30 *l.* left in the Purchaser's Hands to indemnify the Plaintiff: And the Indemnification is against the *Claim*, and all Consequences of it. The Obligee has nothing to do with the *Claimant's* Right: It is enough, that he is damnified by the *Claim*. And he is not to stay *till* the Determination of the Suit: He has an *immediat* Right to be reimbursed.

Mr. Just. FOSTER and Mr. Just. WILMOT were clearly of the same Opinion: And Both of them explicitly declared themselves to the above Effect.

JUDGMENT for the PLAINTIFF.

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Rex *vers.* Inhabitants of the Tything of Milland.

ON shewing Cause against quashing two Orders, *viz.* An Original Order of two Justices, made for *taxing rating and assessing* the Inhabitants of the TYTHING of Milland, in AIO of the Parish of *St. Peter's Cheesebill* in the *same County*; and the Order of Sessions confirming it;

The Question was, Whether it was sufficiently stated “That Both these Places (*viz.* *Milland* and *St. Peter's*) lie WITHIN the SAME HUNDRED:” Which is a Circumstance essentially necessary to be ascertained, in order to give the Two Justices any *Jurisdiction* in the Case.

For, by 43 *Eliz. c. 2. § 3.* Power is given to Two Justices, in Cases where they perceive a Parish not to be able to maintain its own Poor, “to tax any other Parish *within* the HUNDRED where the Parish is” [Which is all the Authority given to Two Justices.] Then the Act goes on, further, “And if the said Hundred is not able, then the SESSIONS shall assess any other Parish within the County.”

* P. 577.

Now it is here only stated “That the Tything of *Milland* and the Parish of *St. Peter's Cheesebill* Both lie in the *same LIBERTY of the Soke*, where the said Parish lies.”

It was therefore objected That *non constat* that they are within the same HUNDRED: For “*Liberty*” and “*Soke*” are Words of vague, indeterminate Meaning, not equivalent to the known legal Term “Hundred,” nor co-extensive with it; And perhaps the Liberty may extend into *several* Hundreds. However, it is plain that the Two Justices have *not shewn* that they have Jurisdiction: And the Court can't *intend* that they have any.

In Support of the Objection, were cited the following Cases; *viz.* *Foley's Laws relating to the Poor* 31. (or 42 in 3d Edition,) *St. Benedict Parish v. St. Stephen's and St. Mary Magdalen's in Norwich.* Reports temp. *Qu. Ann.* 269. S. C. *Viner*, Title *Poor*, pa. 416. S. C. with *Foley* 31.

The COURT thought it best, to send it back to the Sessions, in order to have the Matter better explained and more particularly stated.

But

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But they did not think themselves bound down by the *particular Word* "HUNDRED," which is the Term used in the Act, so as to be confined to this single *Species of Division* of Counties. For if such Division be called by any *other* Term or Name synonymous or *equivalent* to that of "*Hundred*", it must be equally within the Intention of the Act, and the Court may adjudge according to such *Intention*.

And now, the Case having been newly and particularly stated,

Mr. *Gould*, who was for the Orders, prayed the Opinion of the Court.

And Mr. *Norton*, who was against them, candidly owning That as the Facts are *now* stated, He could not contend but that it does appear (*substantially*) to be a Hundred, though the Division was called by another Name ;

The COURT discharged the Rule, and affirmed the Orders.

BOTH ORDERS AFFIRMED.

* *Johnson vers. Houlditch.*

* P. 578.

Wednesday,
26th April
1758.

IN an Action upon the Case for the Use and Occupation of a House, the Defendant had, in *Hilary* Term last, obtained the Common Rule, for Liberty "To pay 2*l.* 5*s.* into Court, and to "have it struck out of the Declaration, on *Payment of Costs*." The Plaintiff's Attorney applied to get these Costs taxed, and take the Money out of Court. Upon and after which Application,

Mr. *Whitaker*, for the Defendant, had moved (in the Beginning of this Term) to discharge this Rule so far as related to the *Costs*; and also that the PLAINTIFF should pay the Costs of the Suit itself, and also the *Costs* of that Application: For that the Plaintiff had the very same Offer of the very same Sum, before the Judge.

The Case he went upon, (and from whence he argued the Plaintiff's Conduct to be oppressive) was as follows—A Quarter's Rent (amounting to 2*l.* 5*s.*) and Nothing more, was due from the Defendant to the Plaintiff. The Defendant was *always ready to have paid it*: But the Plaintiff kept out of the Way in order to *prevent* a Tender; and yet brought his Action as above stated, by Bill returnable

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turnable last Term. The Defendant summoned the Plaintiff before a Judge, to shew Cause "Why, upon Payment of the DEBT and Costs, proceedings should not be stayed." The Plaintiff's Attorney pretended that the Plaintiff had *other* Demands, and therefore refused to take the 2 l. 5 s. and Costs. And so the Judge was precluded by this Allegation, from interfering; and could make no Order. This *obliged* the Defendant to apply to the Court, for the Common Rule, "To pay the 2 l. 5 s. into Court, with the Costs then incurred:" (*After which*, if the Plaintiff proceeds, it is at his Peril.)

But as this Common Rule is always made upon the Terms of the Defendant's paying Costs to the Plaintiff; Mr Whitaker's Motion made as abovementioned, was "To set aside *so much* of the said Rule as put upon the Defendant those Terms of PAYING Costs to the Plaintiff:" And he had even added to this Motion, "That, on the contrary, the Plaintiff should pay the Costs of the Suit itself, and also of that Application, TO the DEFENDANT;" It being most manifest that the Plaintiff was determined to *oppress* the Defendant, as it now appeared that only this 2 l. 5 s. was really due to him.

Mr. Norton, on Behalf of the Plaintiff, now shewed Cause against Mr. Whitaker's Rule. And

* P. 599. * He insisted, that *however oppressive* this Action might appear, Yet the Plaintiff had, *by Law*, A RIGHT to bring it: And consequently, he was INTITLED to his Costs of Suit, to be taxed and paid to him, upon the Defendant's obtaining this Rule, under the * Statute, which gives Liberty to pay "the Rent due into the Court:" For those are the Terms PRESCRIBED by that Act.

* I take these Rules to be discretionary, and founded upon the Course and Practice of the Court; not upon any particular Statute.

But

The COURT, upon full Consideration of the Matter, looked upon these Proceedings thus carried on by the Plaintiff, to be *oppressive*: And therefore they did DISCHARGE *so much* of the abovementioned Rule as directed the Payment of Costs by the Defendant to the Plaintiff.

The Rule now made was this; *viz.*

"It is ORDERED that the said Rule [made in this Cause on Wednesday next after three Weeks from Easter-Day in this same Term] be DISCHARGED: And also that *so much* of the Rule made in this Cause in the last Hilary Term, for the Payment of 2 l. 5 s. into Court, as relates to the Payment of Costs to be taxed by Mr. Clarke, be DISCHARGED.

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Hutchins *vers.* Chambers et al'.

Friday, 20th
April 1758.

THIS was a Special Case from *Surrey Assizes*, before, *Ld. Ch. J. Willes*.

It was an Action of *Trespass* against the *Justices of Peace*, the *Parish Officers*, the *Constables*, and their *Assistants*; for executing a *Warrant of DISTRESS* made by these two Justices, *upona Poor-Rate* amounting to 13 *l.* 2 *s.* And a Verdict was found for the Plaintiff against ALL the Defendants, subject to the Opinion of the Court upon the whole Matter.

The Distress at first taken, was 5 Geldings, stated to be *Beasts of the Plough and Cart*; with their *Halters*. Which first Distress not being sufficient, they distrained a *second Time*, under the SAME *Warrant*: and took 3 other Geldings, which were and are stated to have been also *Beasts of the Plough and Cart*, of the Value of 36 *l.* 17 *s.* with their *Halters*. It is expressly stated, "That upon the former Distress, there WERE OTHER Goods &c, more than sufficient to answer the Value of the Demand, besides these Beasts of the Plough and Cart.

*This Case was first argued on *Tuesday* the 31st of *January* 1758, * P. 580. by Mr. *Knowler* for the Plaintiff, and Mr. *Gould* for the Defendants; And again, on *Friday* the 14th of *April* 1758, by Mr. *Stowe* for the Plaintiff, and Mr. *Williams* for the Defendants.

There were 5 Questions stated for the Opinion of the Court, *viz.*

1st. Whether the *Rate and Assessment* was a good and sufficient *Rate and Assessment*, in Point of Law: And if not, then Whether the Plaintiff can avail Himself of any Objection to it.

2d. Question. Whether the *Warrant* ought to have fixed and LIMITED the TIME * WITHIN WHICH the Geldings and Goods * V. 27 G. 2. distrained were to be sold: And whether for want thereof, the War- c. 20. and rant is VOID, and the Defendants, or any, and which of them, are 17 G. 2. c. 38. *Trespassers*.

3d Question. Whether the SECOND Distress is at all justifiable:

4th Question. Whether the Geldings, being *Beasts of the PLOUGH*, and used by the Plaintiff, BOTH for the *Plough AND Cart*, were LIABLE to be taken and distrained FOR the said RATE and ASSESSMENT.

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5th Question. Whether, upon the whole State of the Case, the Plaintiff's *Action* is maintainable against the Defendants, or any, and which of them.

And a 6th Question, "Whether the 2d Distress was not excessive," arose upon the Argument.

After the first Argument, (in which, the Distress was treated as a *Common-Law* Distress; and Mr. Knowler expressly denied it to be an Execution, because it was repleviable; and insisted that the Statute *de districtione Scaccarij* is general, is declaratory of the Common Law, and extends to all Distresses for any Cause whatsoever;)

LORD MANSFIELD, finding that the Parties proposed speaking to it again, took Notice That All about the *Rates* is clearly out of the present Case: For if THEY are bad the Parties who thought themselves aggrieved, *should have APPEALED*,

So All about the *Warrants* may be laid out of the Case. For the Warrant is not void, so as to make it a Trespass *ab initio*.

* P. 581. *Therefore the future Argument may be confined to the other Objections.

ULTERIUS CONCILIUM.

Mr. Stowe, who argued for the Plaintiff, on *Friday* the 14th of *April* 1758. passed over 1st and 2d Questions, upon what the Court had intimated after the former Argument; and proceeded directly to the 3d Question.

3d Question. 3d. Question. It is stated that here was sufficient Distress, the first Time: And therefore the *Second* was NOT justifiable. *Co Lit.* 272. *b. Cro. Eliz.* 13. *Moore* 7. 2 *Lutw.* 1532. *Wallis v. Savill.* *Fitz-H. N. B. Title Recaption.* 8 *Co.* 50. *Jehu Webb's Case.* And this is a Duty of a *less* Nature than Rent: And yet even in *that Case*, a double Distress is unlawful.

A second Reason why the SECOND Distress was not good nor justifiable, is because the Warrant is NOT an AUTHORITY to take it: For, the Warrant *having been* ONCE executed, had PERFORMED *it's Office*; and consequently was no more than a Piece of waste Paper, at the *Time of Taking* the second Distress.

4th Question. 4th Question. Beasts of the *Plough* (though used both for Plough and Cart) cannot be distrained for a *Rate*, when there are other Goods sufficient. 51 *H.* 3. *Stat.* 4. *de districtione Scaccarij.* "None shall be distrained by his *Beasts that gaigne his Land*, nor
I " by

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“ by his *Sheep, &c.*” 2 *Inst.* 133. is large and express, “ That this
“ was so by the Common and Civil Law; and that this Statute
“ extends to ALL Sorts of Distresses whatsoever; also to all Manner
“ of Executions, as well at the Suit of the King, as of the Subject.”
Dyer 312.

The Words “ *levy the Debt*” can not be applicable *merely* to Lord and Tenant; but are *general*, and extend to *all* Distresses whatsoever. 1 *Inst.* 289. b. 2 *Inst.* 133.

6th Question. “ Whether the second Distress is not EXCES- 6th Question.
“ SIVE.”

He argued that this Distress was EXCESSIVE; being a Distress taken of 3 Geldings, of *triple* the Value: For the Value was 36 *l.* 17 *s.* 0 *d.* and the Sum distrained for, only $\frac{1}{3}$ (or very little more) of that Sum, *viz.* 13 *l.* 2 *s.* which is excessive upon the Face of it. And he cited 1 *Roll. Abr.* 674: Where Instances are given of Distresses excessive upon the Face of them. 1 *Inst.* 107.

And this Distress is NOT *an entire Distress*: but a Distress of 3 *distinct* Things. And an excessive Distress of *several distinct* Things * is not maintainable: And an Action of *Trespass* will lie for it. *H.* * P. 582. 28 G. 2. *Moir v. Munday et al'* which was a Distress of a Great Quantity of Pedlar's Goods (of the Value of 100 *l.*) which might have been severed; for only 6 *s.* 8 *d.* Therefore both the first and the second Distress are illegal.

Wherefore he prayed Judgment for the Plaintiff.

Mr. *Williams*—*contra*, for the Defendants.

He confined Himself to these 3 Questions, *viz.* First. Whether, under the Statute of 43 *Eliz.* *Averia Caruca* can be distrained for the *Poors Rate*, where there is other sufficient Distress. 2dly. Whether under the Warrant for levying the Sum assessed, a *Second* Distress can be made, where the First is deficient, and a sufficient Distress might have been taken in the first Instance. 3dly. If a *Second* Distress can be made; Whether the Second Distress is not *excessive*, and, whether, on *that* Account, *this* Action can be maintained.

And he observed, That the *two Justices* are not concerned in these present Questions, now remaining before the Court. He observed likewise, that the First Distress's being a *Trespass* or not, depended entirely upon the First of his three Questions; and the second Distress's

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strefs's being a Trespass or not, depended entirely upon the two last of them: and all the three Questions depended principally upon the Statute of 43 *Eliz.*

4th Original
Question;
(Mr. Wil-
liams's 1st.)

He begun with his own first Question, (which was the 4th Original Question :) And He First considered the Nature of the *Duty* created by the 43d of *Elizabeth*, and then the Nature of the *Remedy* thereby given for the Recovery of that *Duty*.

The *Duty* is *not* a Tax upon the *Land*, nor payable out of it; but a Charge upon the *Person*: And it is a Tax throughout the Kingdom, and for *public Benefit*. This is *not* to be considered upon the Foot of a COMMON LAW *Distress*: The Nature, Design, and End of this public *Duty* required the most effectual and speedy Remedy that could be devised.

The Reason why Beasts of the Plough could not be distrained at *Common Law*, will not hold in the present Case.

This is similar to an *Execution*, and essentially different from a *Distress* at *Common Law*.

At *Common Law* the *Distress* could not be sold: It was only taken *nomine pænæ*; not as a *Satisfaction*, (which this is,) for the *Duty*.

* P. 583.

*The REASONS of the Privilege *do not now hold*. Agriculture *then* wanted and required Encouragement, and must have been impeded by a Common-Law *Distress*. *Now*, it does not. *Then*, the Thing distrained could not be sold; and remained useless: *Now*, it may be sold. The Debt, there, was of a *private* Nature: This here, is of a *public* Nature.

This *Distress* is *not* taken as a Pledge, or as a *Mean to compel*; but for a *Satisfaction* for the *Duty* itself, a personal *Duty*, and of a public Nature.

1 Lord Raym. 386. *Vinkensterne v. Ebdon*. Sir T. Raym. 332, *Prideaux v. Warne*. 2 Lev. 96. S. C. Cro. Eliz. 710. *Smith v. Shepheard*, proves that the Rule is not applicable to *Distresses* for such Duties. They are Prescriptions for Toll-through: And the first and last are Instances of *Sheep &c*, taken for *Tolls*.

As to the Statute de *Distractione Scaccarij*—Comparing that Statute with the Statute of *Articuli super Chartas*, 28 Ed. 1. c. 12. (which refers to the Stat. de *Distractione Scaccarij*,) and attending to the Words of it, It can never be taken to *extend* to such Cases as the present

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present; to Parliamentary Remedies; at that Time unknown. It is confined to such Distresses as could be *sold*; to Cases of the Grantees of the Crown, or where the *Prerogative of the Crown* was concerned. * The Mischief, at that Time, was the unbounded Power of the Prerogative in Distresses, and the great Abuse and Oppression exercised by the King's Bailiffs and by Lords of Liberties, are not
* Vide 51 H.
3. Stat. 4.
A. D. 1266.

The King by his Prerogative at the Common Law, might take the Land, as well as the Goods and Chattels in Execution; (Sir *Wm. Harbert's Case*. 3 Co. 12 :) Consequently the Beasts of the Plough.

And though *Sheep* are expressly mentioned in that Act, yet *Sheep* may be distrained for Toll. Which proves "that this Act does not extend to all Distresses." *Cro. Eliz.* 710. is so: *Smith v. Shepheard*—Where *Sheep* were taken for a Toll of 2 *d.* for every 20 *Sheep*; And no Sort of Objection, "that *Sheep* were not distrainable."

Besides the Act of 43 *Eliz. c. 2.* is an *implied Repeal* of the Stat. de districtione Scaccarij.

Another Answer to this Act is—That if they would have availed themselves of it, a *Special Action* ought to have been brought upon this particular Statute. *Register* 97. b. & *F. N. B.* 89. & 90. are particular Forms of Writs upon it.

*So, upon the Stat. of *Marlbridge, c. 4.* (which prohibits unreasonable Distresses,) *Trespass* will not lie for an unreasonable Distress: But the Remedy must be by a *Special Action* founded on the Statute. In 2 *Strange* 851. *Lynne v. Moody*, It was adjudged "that *Trespass* will not lie for taking an excessive Distress: But the Remedy ought to be by *Special Action* founded on the Statute of *Marlbridge*." And on the same Statute, "that Distresses taken in one County, shall not be driven into another," there are Writs formed. *Register* 97. *F. N. B.* 82. But *Trespass* will not lie: It must be a *Special Action*. 3 *Lev.* 48. *Woodcroft v. Thompson*—The three Judges held, (against *North*,) "that he that would take Advantage of the Statute of *Marlbridge, c. 4.* and "1, 2 *P. & M. c. 12.* ought to do it by way of Action, &c." * P. 584.

Their Argument would prove too much. For *Sheep* were privileged by the Common Law; and by the Stat. de Districtione Scaccarij, expressly "No Man shall be distrained by &c—nor by his *Sheep*." But *Sheep* are now allowed to be distrainable for a *Poor's Rate*. So are the other Things mentioned by Lord Coke (from the *Mirror*)

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*V. Comment on c. 15. sub finem which mentions Beasts and living Things; and also mort-Goods, as Armour, Apparel, Vessel, Jewels &c, and even Saddle Horses.

in his 2d *Inst.* 133. * as not distrainable at Common Law, if there were other Goods sufficient. All these are surely distrainable for this Rate. 1 *Ld. Raym.* 386. *Raym.* 232. & 2 *Lev.* 96. S. C. *Cro. Eliz.* 710.

Therefore the 43 of *Eliz.* is *not confined* to COMMON LAW Distresses.

But these Beasts are stated to be "Beasts of the Plough AND " *Cart.*" Therefore they *are* distrainable: For Beasts of the *Cart* are not privileged. 1 *Sid.* 422. 440. *Welch. v. Bell.* 2 *Keb.* 595. S. C. *Bract. Lib.* 4. 217. *b.* speaks of *Oxen*, as Beasts of the Plough.

However, *This* is an EXECUTION: And therefore none of the Arguments relative to the Distresses can be applied to *this* Case.

When Goods are seized in *Execution* on a *fieri facias*, the Debt is discharged. So is 2 *Ld. Raym.* 1072. *Clerk v. Withers.*

This is a Distress for a *Satisfaction* of the Demand; *not* for a Pain, or Penalty, or Pledge. Consequently, it is an *Execution*. This is the *Essential Difference* between an Execution and a Distress at Common Law,

In the Case of *Rex v. Speed—Cases temp. W.* 3. 328. A *Levari facias* out of *B. R.* after Affirmance of a Conviction for Deer-Stealing was holden regular: And it was considered as an *Execution*; For *per Holt*, "When a Statute says *Money shall be levied by Distress*, this is an *Execution*." Therefore, it being an *Execution*, Beasts of the Plough might have been taken

* P. 585.

And so they may here, *This* being an EXECUTION.

What has been urged on the other Side, from 2 *Inst.* 133. "That the Statute de *Distractione Scaccarij* extends to *all* Distresses whatsoever, and likewise to Executions," is one of the very few Mistakes of that excellent Writer. And this Opinion of Lord *Coke* is not only contrary to common Experience; but also to the Opinion of *Ld. Ch. J. Holt*, in *Comberb.* 356. *Hardisty v. Barney*—where *Holt* said, "that upon a *Fieri facias* the sheriff may take *any Thing* but wearing Clothes; Nay, if the Party has two Gowns, "He may take One of them."

And *Sheep* are notoriously distrainable now: and yet they are expressly and by Name, within the Stat. de *Distractione Scaccarij*.

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The Stat. of *Westm.* 2. c. 18. which gives the Elegit, expressly excepts Beasts of the Plough. At that Time the Legislature thought such Exception necessary. And *Dyer* 7. b. pl. 10. says That a Man shall not have Execution of the Profits of a Filazer's Office; because he cannot grant and assign it. So that the Rule seems, from that Case, to be, "that whatever may be assigned by the Party, " may be taken in Execution, *et è contra*."

The Doctrine on which these Gentlemen build their Arguments, is now *obsolete*, and unknown to the Generality of Mankind: And it would be very inconvenient to re-establish it. And this Distress is for the Benefit of the Debtor, as these Things are most saleable; and of no Prejudice to any Body. And no Case is cited on the Part of the Plaintiff.

In 3 *Salk.* 136. it is said to have been adjudged "that the Rule " of Common Law, to exempt &c. extends to Cases where a Distress is given in the Nature of an Execution, by any particular " Statute, as for Poor Rates &c. But perhaps this is no Authority to be relied on.

As to the next Question. I agree to 2 *Lutw.* 1532. "That " a second Distress can not be taken for the Remainder of the same " Rent, where the first Distress was only for *Parcel* of the whole " Rent due." But in this present Case, if the Officer is *deceived in the Value* of the first Distress, he may take a Second: So, if the first *dies in the Pound*, (*Dyer* 280. b. pl. 14.) or is by Accident become * *ineffectual*; Or if the Officer did *not know* that there were such * P. 586. other Goods; (which last might be the present Case.) These cannot be looked upon as two distinct Distresses for one entire Demand. 3d Original Question; (Mr. Williams's 2d.)

But if this be considered AS AN EXECUTION; Then there can be no doubt about it. For the Sheriff may, in *such* Case, re-enter before the Return of his Writ, to complete his Execution. And this last Reason equally answers the Objection to the *Warrant*: For that is *not completed and finished*, TILL the *Whole* Demand is levied.

6th Question. As to the *Excessiveness* of the 2d. Distress—

He did not much contend that it was not so, But He insisted that an Action of *Trespass* will not lie for taking an excessive Distress. For Proof of which, He relied on the Case of *Lynne v. Moody.* 2 *Strange* 851. and the Case in 3 *Lev.* 48. *Woodcroft v. Thompson*

6th Original Question; (Mr. Williams's 3d.)

The

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The Declaration contains two Counts; One for each Trespass: And the Damages are given jointly for Both. Therefore it is incumbent, upon the Plaintiff, to shew that *both* these Distresses are illegal.

Reply. Mr. Stowe in Reply—

4th Question. The Cases of *Tolls* are not applicable to the present Case.

Agriculture deserves Encouragement *now*, as well as formerly.

I suppose the King's Distress might be sold at *Common Law*. Therefore the Act *de Distractione Scaccarij* does extend to *Executions*. And the 43 of *Eliz.* has not repealed it.

These Beasts are privileged, if there be sufficient besides: And here was sufficient besides. Beasts of Cart are within the same Reason, as Beasts of Plough: They *gaignont son Terre*, as the Statute of 51 *H. 3.* says.

5d Question. The Arguments of *Obsoleteness* and *Ignorance* will not hold: For the *former* is not true; and the *latter* will not excuse. 'Tis no part of the Case, "That they did *not at first know* the Value." And it is begging the Question to say "That he may take a second Distress, when the first was not sufficient." That is the very thing that wants to be proved.

6th Question. As to the Case of *Lynne v. Moody*—The Entry there was at first *lawful*; and there was Nothing *subsequent* to make that lawful Entry a Trespass. But here, the second Entry to take the second Distress, was *tortious*: And therefore they are liable to an Action. So that that Determination does not affect the present Case.

* P. 587.

CUR' ADVIS.

This Cause now standing in the Paper, for the Resolution of the Court,

LORD MANSFIELD delivered their Opinion.

The Rule of *Nisi Prius* is so conceived as to submit the Case to the Opinion of the Court, be that whatever it may; and so as to obviate all Objections to the Form of the Pleadings and Finding of the Verdict.

In stating the Case, He observed that there *were other* Things which might have been taken upon the *first* Distress, besides those
I which

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which were actually distrained: But *not* upon the *Second*, (from any Thing that appears.)

Upon the first Argument, the two first Objections were laid out of the Question: Especially since the 17 G. 2. c. 38. So that the *Justices* were out of the Case. For a Defect in the Rate (*unappealed from*) could not avoid the Warrant; Nor is the Warrant *void*, so as to make it a Trespass *ab initio*: And the *Justices* could not be Trespassers, by what the Officers afterwards did.

So that it was reduced to 3 Questions: *viz.*

1st. Whether (upon the first Distress) *AVERIA CARUCÆ* could be taken and distrained for a *Poors Rate and Assessment*; when there were *other Things* that might have been distrained, and which were *more than sufficient* to answer the Value of the Demand.

The 2d Question turned upon two Objections to the second Distress: *Viz.* 1st. Whether the *second Distress*, under the *same* Warrant was at all justifiable, when there was enough that might have been taken upon the *first*; and 2dly. Whether this second Distress, being *excessive*, that Circumstance alone was not a sufficient Ground to maintain THIS *Action of TRESPASS*, independent of any other Consideration.

On the second Argument, Mr. *Williams* not only argued very well as Counsel for his Client; but he explained the whole Learning of *Distresses at Common Law*; which were a *Nomine Pænæ*, not a Satisfaction: And as I adopt the Reasoning of his Argument * throughout, to avoid Repetition now, I will in a great Measure * P. 588. refer to it for the Grounds of the Opinion which the Court is of.

The 1st Question is “ Whether *Averia Carucæ* may be taken
“ for a *Distress upon the Poors Rate*, where there are *other* distrain-
“ able Goods sufficient.

As to this—The *solid Distinction* is, “ That the Seising under the 43 of *Eliz.* and such like Acts of Parliament, is *but* PARTLY analogous to the *Common Law* DISTRESS, (as being replevisable &c;) but is *much more* analogous to the *Common Law* EXECUTION; (like a *Fieri facias*, where the Surplus, after Sale, shall be returned.)

In the Old Common Law Distresses, which were in nature of a *Nomine Pænæ* to compel Payment, It would have been absurd to have suffered the Implements by which a Man gained his Livelihood to be holden as a Pledge: Because that would have been

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taking from the Man, the only Means he had, of being able to pay the Debt. But this Reason don't hold, where the Things distrained may immediately be sold by way of Satisfaction: Which, though called a Distress, yet really is, in this Respect, an *Execution*.

The Adjudication said to have been made in *M. 8 W. 3. C. B.* in 3 *Salk.* 136. was very properly cited by Mr. *Williams*, as no sufficient Authority, and not (of itself) to be relied upon: But I take it that the same Reason was gone upon, in the Case in 1 *Ld. Raym.* 386. *Vinkensterne v. Ebdon*, *M. 10 W. 3. B. R.* Where *Ld. Ch. J. Holt* says, "It is true, a Horse cannot be distrained in a Smith's Shop &c: But there is no such Restriction, where the Distress is for a PERSONAL Duty." And He observed that the Duty, in that Case arose out of the Goods laden to be exported: So that by their being laden, the Duty commenced, and the Ship became chargeable; and, *à fortiori*, any Part of her. I take the Meaning of what He there says of personal Duties, to be applicable to the Case of Parliamentary Duties alluded to in 3 *Salkeld*, and consequently to be agreeable to 3 *Salk.* 136. which says, It was adjudged "That this Common Law Exemption of Utensils, Tools, Instruments of Husbandry &c from Distress, holds only in Distresses for Rent-Arrear, *Amerciaments* &c; but doth NOT extend to Cases where a Distress is given in the nature of an Execution, by any particular Statute; (as for Poor Rates &c.)"

Therefore it is more analogous to an *Execution*, than to a Distress at Common Law: And there, (in Cases of Execution,) *Averia Caruæ* may be distrained; although there be other sufficient Distress.

* P. 589. * And on this Ground, We are All of Opinion, that there is no Objection to the first Distress, from the *Averia Caruæ* being taken: For that they are distrainable under the 43 *Eliz.* and such like Acts of Parliament.

Thus far, You see, relates only to the first Distress.

As to the SECOND Distress—

The 1st Question relating to that, is "Whether this second Distress can be AT ALL justified: As it was a SECOND Distress taken under the same Warrant; when enough might have been taken at first, if the Distrainer had then thought proper.

Now a Man who has an ENTIRE Duty, shall not SPLIT the entire Sum; and distrain for Part of it at one Time, and for other Part of it at another Time; and so toties quoties, for several Times: For that is great Oppression. And that is the Case of *Wallis v.*

Savill

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Savill et al' in 2 *Lutw.* 1532: Where the second Distress was holden unjustifiable; because Both Distresses were taken for *One and the same* Rent; And it was the Lessor's Folly, that He had not taken a sufficient Distress at first.

But if a Man seises *for the WHOLE* Sum that is due to him, and *only* mistakes the *Value* of the Goods seised, (which may be of very uncertain, or even imaginary Value, as Pictures, Jewels, Race-Horses &c;) there is no Reason why he should not afterwards *complete* his Execution by making a further Seizure. And how can the Officer who seises, judge of the real or perhaps imaginary Value of the Horses or Goods seised? The Value of them may be quite unknown to him, or may even depend upon Whim and Fancy.

It is to the *Advantage* of the Owner of the Goods, that this should be so: It is better for him that the Officer should be at Liberty to seize a second Time, in case he makes an insufficient Seizure the first Time. Or else, it might induce him to a Necessity of taking Effects of a very great Value, at first: For if he is to be precluded from thus making up the Deficiency, He will certainly take care not to take too little at first.

Now Pictures, Horses, Jewels, Books, and some other such Effects, may be of so uncertain and even imaginary or fancied Value, that it may be exceedingly uncertain how much Money they may fetch, when they come to be sold: So that the Person seizing may not be at all able to judge how much they may produce, upon Sale.

* And if he does not take the Value of the whole at first, (out of * P. 590. Tendernefs and Moderation perhaps,) there is no Reason why he should not complete it by a second Seizure; Provided it be for the *SAME Sum due*.

Therefore this *first* Objection to the Second Distress, fails.

3d. Question. The *second* Objection to this second Distress, is the third remaining Question; *viz.* It's being *excessive*, and as such being a sufficient Ground for an Action of Trespass.

Now as to this third Question, "Whether the taking an excessive Distress, is a sufficient Ground to maintain an Action of Trespass;" several Authorities have been cited, * to shew "that an Action of *Trespass* will NOT lie for taking an excessive Distress;" but "that it ought to be a *particular* Action grounded upon the Statute;" And particularly, One Case, which is in 2 *Strange* 851. *Lynne v. Moody*, M. 3 G. 2. B. R. where it had been adjudged for the Plaintiff, in C. B. But the Judgment of C. B. was reversed; And

* Vide ante
pa, 582, 583,
584, 585,
586.

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And it was said "That the Remedy ought to be by *Special Actio*
" *founded on the Statute of Marlbridge.*"

So that it has been sufficiently established "That a *Gener*
" *Action of Trespass* can *not* be maintained for taking an excessive
" *Distress.*"

One Case indeed was cited to the *contrary*: Which was the Case
of *Moir v. Munday*, H. 28 G. 2. B. R. And that was an *Action*
of *Trespass*; where 6 Ounces of *Gold*, and 100 Ounces of *Silver*
were taken for 6 s. 8 d. which was holden to be an excessive *Dis*
treffs; And Judgment was given for the Plaintiff.

But that *appeared* upon the *Face* of it, and upon the *Pleadings*, to
be excessive: And so the Court expressly declared. And it was
Distress of *Gold* and *Silver*; which are of a *certain known* Value,
and even the *Measure of the Value* of other Things. But it was
there holden, "that in *all* OTHER Cases of Goods or other Things
" of *Arbitrary* and uncertain Value, it *MUST* be an *Action upon*
" the *Statute.*" And this (as I am told) was the *Distinction* there
taken: And that is therefore an *Exception* (and was there consi-
dered as being so) from the general Rule; and serves to *confirm* the
Rule itself.

We are therefore All of Us of Opinion That there is *no* Cause of
Action maintainable by the Plaintiff in the present Case, nor has he
* P. 591. *any Right to recover against ANY of the Defendants; and that the
Defendants be at Liberty to enter a Non-suit.

The RULE taken was,

" That the *Posse* be delivered to, and Judgment
" entered for the DEFENDANTS."

Rex *vers.* Inhabitants of Caverswall.

Monday, 1st
May 1758.

See this CASE *abridged*, in the TABLE; and *at large*, in the
Quarto-Edition of my SETTLEMENT-CASES, N^o. 147.
pa. 461. 2

Baldwin

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Baldwin et Ux' *vers.* Blackmore Esquire.

Tuesday, 2d
May 1758.

THIS was a Case reserved at the Assizes for the County of *Lancaster* in an Action for an Assault upon, and *false Imprisonment* of the Plaintiff's *Wife*.

CASE—That the Plaintiffs *William Baldwin* and *Susannah* his Wife, being *Paupers*, legally settled in the Township of *Banknewton* in *Yorkshire*, had been regularly and properly removed by an Order of two Justices of the County of *Lancaster* from *Marsden* in *Lancashire*, to the said Township of *Banknewton* in the said County of *York*, as the Place of their last legal Settlement: Which Order was not appealed from. That afterwards, they (*Both* of them) RETURNED of their own accord and without bringing any Certificate with them from *Banknewton* (to which they belonged,) to *Marsden* aforesaid, from whence they had been so removed by the said Order of two Justices. Of which, Complaint being made in Writing, and upon Oath, to the Defendant, who was a Justice of Peace of the said County of *Lancaster* wherein the said Parish of *Marsden* lay, by the Overseer of the said Parish (from which the *Paupers* had been lawfully removed, and to which they unlawfully returned,) He issued his Warrant to bring the two *Paupers* (the *Man and his Wife) before him: Who being accordingly brought before him, and the Facts being fully proved, upon Oath, made by *Thomas Murgatroyd*, one of the Churchwardens of *Marsden* aforesaid, He committed BOTH of them, the Man AND his WIFE, to the *House of Correction*, “there to remain UNTIL they should be “DISCHARGED BY DUE COURSE OF LAW.” The Warrant was directed to the Constable of *Marsden*, to convey; and to the Master of the House of Correction in *Preston*, to receive: And was in these Words, “Whereas *Thomas Murgatroyd*, One of the Church-wardens of the Township of *Marsden* in the said County, hath made “Oath before Me, One of his Majesty's Justices of the Peace in “and for the said County, That *William Baldwin* and *Susan his Wife*, poor Persons having been lately removed by an Order under the Hands and Seals of *Roger Hesketh* and *Rigby Molineux* Esquires, Two of his Majesty's Justices of the Peace and *Quorum* in and for the said County, from the said Township of *Marsden* unto *Banknewton* in the West Riding of the County of *York*, as “to their last lawful Settlement, are now returned back, to inhabit “in the said Township of *Marsden*, contrary to THE Statute in this “Behalf made; These are therefore, in his Majesty's Name, to “command you forthwith to convey THEM the said *William Baldwin* and *Susan his Wife*, to the *House of Correction* aforesaid,

* P. 596.

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And it was said "That the Remedy ought to be by *Special Actio*
" *founded on the Statute of Marlbridge.*"

So that it has been sufficiently established "That a *Gener*
" *Action of Trespass* can *not* be maintained for taking an excessive
" *Distress.*"

One Case indeed was cited to the *contrary*: Which was the Ca
of *Moir v. Munday, H. 28 G. 2. B. R.* And that was an *Actio*
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be excessive: And so the Court expressly declared. And it was
Distress of Gold and Silver; which are of a *certain known Value*
and even the *Measure of the Value* of other Things. But it was
there holden, "that in *all OTHER Cases* of Goods or other Things
" of *Arbitrary* and uncertain Value, it *MUST* be an *Action upon*
" the *Statute.*" And this (as I am told) was the Distinction there
taken: And that is therefore an *Exception* (and was there confi
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Rule itself.

We are therefore All of Us of Opinion That there is *no Cause* of
Action maintainable by the Plaintiff in the present Case, nor has he
* P. 591. *any Right to recover against ANY of the Defendants; and that the
Defendants be at Liberty to enter a Non-suit.

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May 1758.

THIS was a Case reserved at the Assizes for the County of *Lancaster* in an Action for an Assault upon, and *false Imprisonment* of the Plaintiff's *Wife*.

CASE—That the Plaintiffs *William Baldwin* and *Susannah* his Wife, being *Paupers*, legally settled in the Township of *Banknewton* in *Yorkshire*, had been regularly and properly removed by an Order of two Justices of the County of *Lancaster* from *Marsden* in *Lancashire*, to the said Township of *Banknewton* in the said County of *York*, as the Place of their last legal Settlement: Which Order was not appealed from. That afterwards, they (*Both* of them) RETURNED of their own accord and without bringing any Certificate with them from *Banknewton* (to which they belonged,) to *Marsden* aforesaid, from whence they had been so removed by the said Order of two Justices. Of which, Complaint being made in Writing, and upon Oath, to the Defendant, who was a Justice of Peace of the said County of *Lancaster* wherein the said Parish of *Marsden* lay, by the Overseer of the said Parish (from which the *Paupers* had been lawfully removed, and to which they unlawfully returned,) He issued his Warrant to bring the two *Paupers* (the *Man and his Wife) before him: Who being accordingly brought before him, and the Facts being fully proved, upon Oath, made by *Thomas Murgatroyd*, one of the Churchwardens of *Marsden* aforesaid, He committed BOTH of them, the Man AND his WIFE, to the *House of Correction*, “there to remain UNTIL they should be “DISCHARGED BY DUE COURSE OF LAW.” The Warrant was directed to the Constable of *Marsden*, to convey; and to the Master of the House of Correction in *Preston*, to receive: And was in these Words, “Whereas *Thomas Murgatroyd*, One of the Church-wardens of the Township of *Marsden* in the said County, hath made “Oath before Me, One of his Majesty's Justices of the Peace in “and for the said County, That *William Baldwin* and *Susan* his “Wife, poor Persons having been lately removed by an Order under the Hands and Seals of *Roger Hesketh* and *Rigby Molineux* “Esquires, Two of his Majesty's Justices of the Peace and *Quorum* “in and for the said County, from the said Township of *Marsden* “unto *Banknewton* in the West Riding of the County of *York*, as “to their last lawful Settlement, are now returned back, to inhabit “in the said Township of *Marsden*, contrary to THE Statute in this “Behalf made; These are therefore, in his Majesty's Name, to “command you forthwith to convey THEM the said *William Baldwin* and *Susan* his Wife, to the *House of Correction* aforesaid,

* P. 596.

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“ and deliver THEM to the Master thereof; hereby requiring Him
“ to receive THEM into his Custody, and THEM safely to keep
“ UNTIL they shall thence be discharged by *due Course of Law*.
“ Hereof, fail not, at your Peril—Given &c, this 8th Day of Fe-
“ bruary &c.

That under this Warrant of Commitment, the Plaintiff and his Wife were kept in Prison in Custody of the Keeper of the House of Correction at *Preston*, from 12th *February* to 17th *March* following.

Notice was proved to be given to the Defendant of bringing the Action, one Month before it was brought.

Upon the Trial of this Cause, There was a Verdict for the Plaintiff, and 1 s. Damages, subject to the Opinion of the Court upon the two following Questions; *viz.*

1st. Whether there ought not to have been a *previous Conviction* of *Vagrancy*.

2dly. Whether the WIFE could be convicted of *Vagrancy*, or be liable to be sent to the House of *Correction* for returning without a Certificate; as She only accompanied and resided with her *own Husband*.

* P. 597. * N. B. By 13, 14 C. 2. c. 12. § 3. It is provided that any Person or Persons *may go TO WORK* in any Parish or Place, *carrying* with them a *Certificate* of their being Inhabitants of their proper Parish: And, in such Case, if they shall not return when their Work is finished; or shall fall sick or impotent, whilst they are in the said Work; it shall not be accounted a Settlement; but two Justices of the Peace may convey *the said* Person or Persons to the Place of his or their Habitation as aforesaid. And if *such* Person or Persons shall refuse to go, or shall not remain in such Parish, but *shall RETURN*, of *HIS own Accord*, to the Parish from whence He was removed; it shall and may be lawful for any Justice of the Peace of the City County or Town-Corporate where the said Offence shall be committed, to *send SUCH Person or Persons* offending, to the *House of Correction*, there to be *punished as a VAGABOND*; or, to a *public Workhouse* (in the Act after-mentioned;) there to be employed in Work or Labour.

By 17 G. 2. c. 5. § 1. It is enacted, that Whereas the Number of Rogues Vagabonds Beggars and other idle and disorderly Persons daily increases &c; All Persons who threaten to run away
and

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and LEAVE their WIVES or Children to the Parish; and ALL Persons who shall UNLAWFULLY return to such Parish or Place from whence they have been legally removed by order of two Justices of the Peace, WITHOUT bringing a Certificate from the Parish or Place whereunto they belong; And also all Persons who &c &c shall be deemed IDLE AND DISORDERLY Persons: And it shall and may be lawful for any Justice of Peace TO COMMIT such Offenders (being thereof CONVICTED before Him, by his own View, or by their own Confession, or by the Oath of One or more Credible Witnesses or Witnesses,) to the House of Correction; there to be kept to hard Labour, for any Time NOT exceeding one Month.

As to the two Points, It was insisted on Behalf of the Plaintiff—

1st. That there ought to have been a *previous* CONVICTION of Vagrancy, before the Justice could commit to the House of Correction at all.

2dly. That *Susannah* the Wife, following and *residing* WITH her OWN HUSBAND to and at *Marsden*, could not be convicted of VAGRANCY, for returning there without a Certificate.

This Cause was first argued on *Tuesday* the 21st of *June* 1757, by Mr. *Yates* for the Plaintiff, and Mr. *Clayton* for the Defendant.

*And again on *Friday* the 11th of *November* following, by Serjeant * P. 598. *Poole* for the Plaintiff, and Mr. *Norton* for the Defendant.

For the Plaintiff it was argued to the following Effect.

For the
Plaintiff.

1st Point—On 17 G. 2. a *previous Conviction* is expressly made necessary; The Words of it are, “being thereof *convicted &c.*” And 3 Methods of Conviction are specified; *viz.* View, Confession, and Proof by One or more Witnesses.

Now here was Nothing but the mere Complaint and Information of the Parish-Officer; without any *Adjudication* by the Justice, “that it was true.”

Therefore the Justice proceeded without any Authority.

On 13, 14 C. 2. No previous Conviction is indeed necessary, by any express Words of the Act of Parliament. But such an arbitrary and extraordinary Power ought to be very narrowly watched. However, this cannot be a Proceeding under this Statute of 13, 14 C. 2. For the Foundation of this Warrant is the Information of the Churchwarden on Oath; which plainly goes upon an Offence
created

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created since that Statute of C. 2. viz. "Returning *without bringing a Certificate* from the Parish to which they belonged."

2d Point—This Return of the Woman cannot be considered as an *unlawful* Return. A Feme Covert is *obliged* to follow her Husband. If She commits Theft, in Company with her Husband, it shall be taken to be done by the Coercion of her Husband. 1 Hawk. P. C. fo. 2, 3. Sect. 9, 10, 13. Bro. Coron. 108. Kelynge 31, 37. Hale's H. P. C. Vol. 1. pa. 516. and pa. 47. 3 Inst. 108.

Indeed there are Cases where the Wife is the *PRINCIPAL Arrest*, (as keeping Bawdy-houses,) where She is punishable with her Husband. But here, SHE is guilty of *no* Offence at all.

As to it's being a hard Action—Our's is a very hard Case.

For the De- *Contrà* for the Defendant, (the Justice of Peace, who had committed the Woman,) it was argued to this Effect;

1st Point—If this Proceeding should be taken to be on 17 G. 2. And even supposing a Conviction to be previously necessary, Yet it is not necessary that such a Conviction should be *expressly* STATED upon this Case: But the Justice may, *at any Time*, draw up a Conviction in Form, upon the Facts here stated; which Conviction he was not obliged to draw up *in Form*, till called upon.

* P. 599. * But this Proceeding is upon 13, 14 C. 2. c. 12, § 3. And the Case is within the Words of that Act, viz. "Returning of her own Accord, to the Parish from whence she was removed."

And these two Acts (of 13, 14 C. 2. and 17 G. 2.) are consistent: And the latter does *not repeal or vacate* the former; It operates as a *Saving*, under that Act. And upon this former Act, no Conviction is necessary.

2d Point. A Wife may be guilty and liable in committing a Crime *with* her Husband, from Trespass * up to Murther and Treason. In Dr. Hufsey's Case, in Hob. and in Lord Coke, A General Rule is laid down, as to married Women, "That where Case: Where *they offend voluntarily and knowingly, they are liable to Punishment.*"

* V. Hob. 96. and 9 Co. 73. Dr. Hufsey's Case: Where whatever may be to the Purpose in the present Case (if any Part of it is at all so,) will be found. This is a new Law; and the Wife was intended to be included in it: And if Wives are within the Mischief of a Statute, they shall be included in it. The matrimonial Vow must be understood as restrained to *lawful* Acts: The Wife ought not to obey her Husband in unlawful Acts.

In

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In Trespass *vi et armis*, the Wife might be seised for the Fine. And the Coercion of the Husband *only excuses* Her from suffering for the Crime: It does not make the Act *lawful*. She ought not to commit Theft; although the supposed Coercion of the Husband excuses Her from Punishment.

This Act expressly includes *All Persons whatsoever*. The Words are general; and so also was the Intention.

And the Husband's Act (of returning) is *unlawful*: And therefore She ought not to follow him, and thereby commit an unlawful Act Herself. Nor is She obliged to follow him *for Maintenance*: For the Parish to which they were removed, is obliged to maintain Her, in the same Manner as if her Husband had run away.

If it were otherwise, here would be an innocent Parish, who must be at a continual Expence of removing the Wife back, *toties quoties*, without being reimbursed for their Charges: And if She was *obliged* to return with her Husband once, She would *always* be obliged equally so to do, whenever He should return Himself.

All their Reasoning would hold just as strongly in obliging the Wife *to assist* her Husband and *obey him* in *keeping a Bawdy-house*, *as in *any other* ILLEGAL Act. Yet for keeping a Bawdy-house, she * P. 600. is certainly punishable with her Husband. *

This is not a Commitment in *Execution*, and by Way of *Judgment* for an Offence: It is a Commitment on 13, 14 C. 2. and not on 17 G. 2. nor for any definite Time. They might have been *bailed* on this Commitment: For it is only, "till discharged by due Course of Law." And though the Words of the Act of 13, 14 C. 1. are "*There to be punished as a Vagabond*;" yet this is only in order to be amenable to Justice upon a *future* Indictment. And so the sending them "to a *public* † *Workhouse*, there to be employed in Work and Labour," is no Punishment to a poor Person, who is *used* to Work and Labour.

* 1 Salk. 384.
Regina v.
Williams, M.
10 Ann. B. R.
and Rex v.
Hayward, a
later Case.

† But the
Commitment
is "to the
House of Cor-
rection."

It would be highly *unreasonable* that the Husband (who could not bring an Action in his *own* Name and on his *own* Account) should be permitted to bring it on Account of his *Wife*, and in her Name, against a Magistrate who has acted for the public Good; and HIMSELF *receive the Benefit* of what has been originally occasioned by and taken it's Rise from his own *unlawful Act*.

The Counsel for the Plaintiff replied to the following Effect.

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Reply.

As to the Conviction being still in the *Power of the Justice* to draw up in Form—It does not appear that there *ever will* or *can* be such a Conviction: But it is plain that there is *none*.

It does not any how explicitly *appear, upon WHAT Act*, this Commitment is founded. But however, it *must* be on 17 G. 2. because the Information is for an Offence expressly within that Statute; and the Warrant of Commitment is founded upon the Information. Therefore there ought to have been a *previous Conviction*.

The Certificate could not be in the *Wife's* Power to produce: Her Husband must have it, if there was any.

We do not deny that the Wife was so far *within the Intent* of this Act of Parliament, that She was *capable* of being a Vagrant: She might have gone about begging; She might have returned to this Parish without her Husband. But We say that here is no Act of Vagrancy stated; and for the particular Fact that *is* stated, her being *sub Potestate Viri*, was an *Excuse* to Her: She is within all the Excuses mentioned in Dr. *Hussey's* Case, for Persons guilty against the *Letter* of a Law.

The Hardship of the Parish to which these Persons returned cannot destroy the General Law of the Land.

* P. 601. * A married Woman's Keeping a *Bawdy-house* jointly with her Husband, varies from the general Principle: Because there She is the PRINCIPAL *Actor*, and *Chief Manager* and *Conductor*.

The present Commitment is, “*till discharged by due Course of Law.*” But still it may be a Commitment on 17 G. 2: As it does NOT EXCEED a Month; though it does *not indeed fix* it TO a Month.

It is a quite new Doctrine, “that Imprisonment in a House of “Correction is no Punishment:” Certainly, It is a Punishment, and no small One.

As to the Husband's becoming intitled to the Damages, when recovered; that arises from the *Law* itself: But it is properly the *Wife's* Action, and will *survive to HER*; though She (being Covert,) cannot by Law bring it in her *own Name*. This therefore is the *Act of the Law*; and ought not to be objected to the *Husband*, much less, to the *Wife*, whose Action this properly is.

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Lord MANSFIELD desired to be informed how the Usage was: (though it would not indeed, as he observed, alter the *Law*.)

The Counsel had not made this Inquiry. But Both the Counsel, and also Mr. Just. FOSTER and Mr. Just. WILMOT said, That the Act of 13, 14 C. 2. had been ALWAYS *considered* as GENERAL, and NOT *as tied up* by the particular Words of Reference to that *particular Case of going to work, only*. And

Lord MANSFIELD said that perhaps that might have been practised for the Sake of General Good.

He strongly intimated that it would be a right Thing to *compromise* this Cause: And if it should not be so, He desired to know the *Practice and Usage*, about sending the *Wife* to the House of Correction, with the Husband.

As to 13, 14 C. 2. He said He was now satisfied by his Brother *Foster*, "That it had always been *taken* as a GENERAL Law;" notwithstanding the Words of Reference; (which had struck Him on the Reading.)

Mr. Just. FOSTER desired to know also how the Practice had been as to *Children*.

Mr. *Clayton* (who was Counsel for the Defendant in the former Argument) said He had known the *Children* also committed.

CUR' ADVIS', (i. e. *eventually* if not compromised.)

* P. 602.

On *Tuesday*, 25th *April* 1758, This Case being mentioned at the Bar, as standing for the Opinion of the Court,

Mr. *Norton* (for the Defendant) then said He had several Certificates of it's being the PRACTICE, for Justices to commit the WIFE, as well as the Husband, for Returning to the Parish from whence they had been removed; *although* She so returned, WITH *her Husband*.

Lord MANSFIELD now (on *Tuesday* 2d *May* 1758,) delivered the Resolution of the Court.

He first stated the whole Case very fully. And He prefaced, That it was manifest that the Justice had *not* acted *intentionally* wrong: And it is plain that the Jury were of that Opinion, as appears

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pears by their giving *only* 1 s. Damages: The Court would gladly therefore have leaned towards excusing this Gentleman from suffering for what he had honestly and without any bad Intention done; if they could have found him justifiable by any legal Excuse.

But there is One FATAL *Objection* to his Proceeding, which We cannot get over; and which puts all the *other Points*, out of the Case: And that is, that the WARRANT of Commitment is ILLEGAL.

The *Legality of the Warrant* depends upon *Two* Acts of Parliament, or at least upon *One* of them: For there are *Two* Acts of Parliament upon *One* of which two, this Warrant must be founded; though it does not appear, upon *which* of the *Two*, the Justice proceeded.

* Vide ante
pa. 597.

† 8, 9 W. 3.
c. 30. first in-
troduced
them.

These two * Acts are 13, 14 C. 2. c. 12. (a Law made *before* Certificates under the † late Acts existed) And 17 G. 2. c. 5. (which relates to Persons returning, &c. without bringing such a Certificate.)

Now this Warrant is *not* within this *former* Act, of 13, 14 C. 2: Nor is the Case itself within it. These Persons did not go to any Parish, *carrying with them* a Certificate of their being Inhabitants of their proper Parish: Nor is the Commitment made “to the House of Correction *there to be punished as a Vagabond*,” Nor “to a *public Workhouse, there to be employed in Work and Labour*,” as that Statute directs. So that the Warrant is not at all agreeable to the *Directions* of THAT Act, which specifies the *particular Manner* of sending the Offender to the House of Correction, or to a public Work-house: For it is, only, “to remain *TILL discharged by due Course of Law*.”

* P. 603.

Neither can this Warrant be good upon the *latter* Act, of 17 G. 2. c. 5. Because though this is indeed a Commitment to the House of Correction, (which the latter Act directs,) Yet it is “to *REMAIN there TILL discharged by due Course of Law*.” Whereas, by *this Act*, the Power given the Justice is “To commit such Offenders to the House of Correction, there to be kept to hard Labour for any Time *NOT exceeding ONE Month*.” But this *Warrant* is quite *general*: It is an *indefinite* Commitment; NOT for a *precise limited Time*, as this Act expressly directs and requires.

Therefore the Warrant of Commitment is totally illegal: And consequently, the Plaintiff is intitled to the Damages that he has recovered.

And

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And You'll observe, that We go ONLY *upon the* WARRANT : Which for the Reasons I have mentioned, We hold to be totally *illegal*.

RULE That the *Postea* be delivered to the PLAINTIFF.

Thomas *vers*. Powell.

Friday, 5th
May 1758.

A Feigned Issue had been agreed upon, between the Parties and by Approbation of the Court, in order to try a Corporation-Right.

This feigned Issue had been now tried : And it was found for the Prosecutor in the Original Motion for the Information in the Nature of a *Quo Warranto*.

The Question now was, (upon a Motion for the Direction of the Court, to the Master,) Whether the Prosecutor should have ALL *his Costs previous to the feigned Issue*; or any, and *what Part* of them : Or whether he should *only* have his Costs FROM the *feigned Issue*.

Mr. *Aston* and Mr. *Nares*, who were Counsel for the Plaintiff, insisted to have *All* the Costs: *Viz.* Costs of the *Original Application*; also Costs of *settling the Issue*, (which had been disputed and squabbled about;) as well as the Costs of the Trial of the Issue, in the common Course. They cited *Rex v. Griffiths*, M. 1755, 29 G. 2. *B. R. *Rex v. Justices of Walsall, alias Stubbs et al' v. Nichols et al'*, * P. 604. Tr. 1755, 28 G. 2. B. R. *Herbert v. Williams*, P. 25 G. 2. B. R. *Baskerville v. Redding*, there cited. And 1 *Strange* 33. *Dominus Rex v. Powell et al'*. (Which last was only to shew that an Information in the Nature of a *Quo Warranto*, is to be considered as a Civil Suit, with regard to Costs.)

And they said that this being of the Nature of a *Civil Suit*, in the Original Application to the Court, was different therefore from Cases where the Original Application was of a *Criminal Nature*, where *no Costs were payable* by the Defendant.

Mr. *Morton*, on Behalf of the Defendant, denied that *any more* Costs ought to be here taxed, than *merely those of the feigned Issue*; and even those, *only* from the Time of the Issue *joined*.

For he insisted that the Original Rule "to shew Cause why the Information should not be granted," was *actually* DISCHARGED, even *before* this feigned Issue was agreed upon as a proper Method

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of Trial of the Right: So that there was no Pretence for the Costs of *that* Application being now included. And the Disputes about the Person to be made Defendant in the feigned Issue, were, and could not but be, *prior* to its being *joined*.

Mr. Just. DENISON and Mr. Just. WILMOT were clear that the Costs to be taxed upon such a feigned Issue, were ONLY the Costs of *the feigned Issue itself*, and NOT any Costs *antecedent* to the Consent to "try the Right in a feigned Issue." And this was settled (as Mr. Just. *Wilmot* said) in the Case of *Walfall*.*

* It was so;
on 2 June
1755, Tr. 28.
G. 2.

And they *Both* said, That it would be endless to enter into the Costs *previous* to the feigned Issue: For they would always be sure to have Disputes, "Which Party was right, And which wrong, at first and upon the Original Motion."

Lord MANSFIELD concurred in their Opinion: Which He explained to mean, (and to which they assented,) "*from the Time*" "when the feigned Issue was FIRST *Ordered and agreed to*."

Note—In the present Case, The Costs of the Disputes about *settling* the feigned Issue, AFTER it was agreed upon and Ordered, were considered as *Part* of the Costs which were to be taxed to the Plaintiff; (who had *prevailed* in the Questions disputed, both before the Master, and before the Court.)

* P. 605.

* Dearden, Assignee &c. *vers.* Holden.

THE Question was, "Whether a Plea of the Statute of 23 H. 6. c. 10. (against Sheriffs taking Bonds *Colore Officii* &c.) "And that this Bond was taken for Ease and Favour &c; be or be "not an ISSUABLE Plea, within a Judge's Order giving the Defendant Time to plead, upon the *usual Terms* of pleading an *issuable Plea* &c."

In the present Case, the Plaintiff had *signed Judgment*, upon the Defendant's having *thus* pleaded, under the *usual* Order from a Judge, "for Time to plead, on the common and usual Terms:" For the Plaintiff considered this Plea, as a *Nullity*; and now insisted that it was so; and therefore that he had a Right to sign Judgment, without giving any Rule to plead.

But The MASTER reported this Judgment to be irregular: And to this, The COURT also assented—For

Per Cur'

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Per Cur' This is an *issuable* Plea: For if the Plaintiff had taken Issue "That the Sheriff *did* NOT let the Defendant go, for Ease and "Favour," It would have brought all Matters suggested in the Plea, to Issue.

The Judge's Order does *not confine* the Defendant to plead the GENERAL *Issue*. The present Plea is within his Order: And the Plaintiff *might* here have taken Issue (as above) "That the Sheriff did "not let the Defendant go, for Ease and Favour:" Which would have let in all the Matters in Issue.

RULE "for setting aside the Judgment, with Costs,"
MADE ABSOLUTE.

But it being suggested by the Plaintiff's Counsel, "That the "Plea was, in Truth and Reality, only a *Sham* Plea, put in merely to gain Time;"—

Mr. Norton, on Behalf of the Plaintiff, moved that the Defendant might *plead as he would stand by*.

To which, it being consented, on Behalf of the Defendant,
This also was made Part of the RULE.

The End of *Easter* Term 1758. 31 Geo. 2.

Trinity

*P. 606.

* Trinity Term

31 Geo. 2. B.R. 1758.

Friday, 26th
May 1758.

Rex *vers.* James Clarke, Esquire.

A *Habeas Corpus* had been issued during the last Vacation, by Lord *Mansfield*, bearing Teste the 8th Instant, being the last Day of the preceding Term, directed to *James Clarke* Esquire, commanding him to have *before his Lordship* AT HIS CHAMBERS in *Serjeants Inn*, immediately, the Body of *Lydia Henrietta Clarke*, his Daughter, then detained in his Custody, together with the Day and Cause of her Taking and Detainer; then and there to undergo and receive what his Majesty's said Chief Justice should then and there consider of, concerning her in this Behalf.

The Writ was now returned *here in Court*: and the said *Lydia Henrietta Clarke* produced.

Mr. *Clarke* the young Lady's Father, returned That She was his DAUGHTER; and that on the 22d of *March* last, She, without any Leave or Notice to Him or to his Wife (her Mother,) secretly went away from his House in *Great Ormond Street*, and took with her a Box or Bundle containing several Sorts of Wearing-Apparel and about 27 *l.* in Money.

That, in about 12 or 14 Days time, He, being credibly informed " That his said Daughter had been INVEIGLED away from
" him by the Instigation of one *James Mervin*, a Person of no visible Occupation or Substance, nor keeping any House; with DESIGN to MARRY her to One *Joseph Isgrave*, who is under Age,
" and who about two Years ago served the said *James Clarke* as a FOOT-BOY, and is yet in no better Condition; and that they
" were all gone together into the Isle of *Thanet*, where they were
" to get a LICENCE for such Marriage;" He being under great Concern for the Welfare of his said Daughter, and in Order to prevent
the

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* *the said Marriage*, (She being *intitled to a considerable Fortune*, * P. 607. after her said Mother's Death, and being likewise *his ONLY Child*,) took a Journey to find them out, and (if in his Power) *to prevent the said intended Marriage*; and gave Directions to his Nephew Mr. *Peter Starkie Floyer*, to go in quest of them, and if he found them, to endeavour to prevent the Marriage and to bring his said Daughter to Him.

That his said Nephew found them out at a Place called *Broad Stairs*, in the Isle of *Thanet*: Where the said *James Mervin* represented himself as, and *passed for*, the Uncle of his said Daughter.

That the said *Lydia Henrietta Clarke* came Home with his said Nephew to his (the said *James Clarke's*) House in *Great Ormond Street*: Where she arrived the 7th of *April* last: and the said *James Mervin* came with her as far as *Canterbury*: But the said *Joseph Isgrave* run away: and the said *James Mervin* pretends He is gone to *Holland*.

That on her being thus brought Home to him, He did, in the *tenderest Manner*, represent to Her the Ruin She was inevitably falling into, if She pursued a Design to marry a Person so much inferior to herself; and who, having no visible Way of Livelihood, must reduce her to the utmost Necessity and Want, as well as Disgrace and Shame. Whereupon She assuring her said Father "That She was *not* married," He, through his Duty as a Parent, and from the Affection he bore towards her, did receive her into his House; and the *mildest and best Endeavours* have been used, *to dissuade Her from such Marriage*; such Endeavours extending no further than what he humbly conceives to be consistent with that parental Care which *may be used by a Father* towards his Child: And no SEVERITY *whatsoever* hath been used to Her.

That She hath, ever since the said 7th Day of *April* last, (when She came Home to his House as aforesaid) hitherto, OF HER OWN ACCORD, continued to live and reside with Him (her Father) and still doth live and reside with him, at his said House, of HER OWN ACCORD and under NO Restraint *whatsoever*.

And there is no Other Cause of detaining the said *L. H. C. &c.*

Note—This *Habeas Corpus* was issued upon an Affidavit made by the above named *James Mervin*; who made out a very *plausible* Case, fully sufficient, (if true) to obtain the Writ; but which was now alledged by Mr. *Norton*, (of Counsel with Mr. *Clarke*,) to be absolutely and utterly FALSE in Fact.

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* P. 608. *In it the young Lady was sworn to be of *full Age*, (*viz.* about 22;) which was true: But it *also* alledged "that She had "been *hardly used*, and *confined*, by her Father," and *other Circumstances* which were false.

Note also—That although this *Habeas Corpus* directed Her to be brought before *Lord Mansfield* AT HIS CHAMBERS; and although She *was actually brought* before *Him* whilst He was sitting at *Guildhall*, on *Wednesday* last; Yet, the Father desiring to have an Opportunity to take the Advice of Counsel, in settling the Return; And the Young Lady declaring publicly, "She had no Objection to continue with her Father, who had always used her with great *Tenderness*, "and much better than she deserved;" His Lordship judged it proper to *adjourn* it, and direct Her to be brought *into Court* the first Day of Term; the rather too, that She might have a Chance of being better advised: For if she had been then taken from her Father, it was plain She would have pursued her improvident Design; and *Mervin* appeared at *Guildhall*, ready to have carried her off. She was *now brought into COURT* by *Virtue of the SAME Writ*, which was returnable *before HIS Lordship, at his Chambers immediate*.

Lord MANSFIELD now only asked Her, "Whether She desired "to continue with her Father, or to go elsewhere."

She answered—"To *continue* with her Father."

Upon which, The Court told Her, She was at Liberty to go. Which She accordingly did.

Then Mr. *Norton* moved that *Mervin's Affidavits* might be FILED, (together with the Return of the Writ;) as Mr. *Clarke* was determined to prosecute him for *Perjury*.

The COURT ordered it to be so; and recommended the Prosecution very strongly to Mr. *Clarke*.

Trinity Term 31 Geo. 2.

* Wilford *vers.* Berkeley

* P. 609.

Saturday,
27th May
1758.

MR. Morton, on Behalf of the Defendant, moved for a *new Trial*, for EXCESSIVENESS of Damages. It was an Action for CRIMINAL CONVERSATION with the Plaintiff's Wife: And the Jury (a Special One) had given 500 *l.* Damages. The Defendant was a Clerk in the Exchequer, during Pleasure, at a Salary of 50 *l.* a Year, only: Which was his *whole Subsistence*.

The Court were, All * Three, clear and unanimous, That al- though there was no Doubt of the Power of the Court to exercise a proper Discretion in setting aside Verdicts for Excessiveness of Damages, *in Cases where* the Quantum of the Damage really suffered by the Plaintiff could be *apparent*, or were of such a Nature that the Court could *properly judge of the Degree* of the Injury, and could *see manifestly* that the Jury had been outrageous in giving such Damages as greatly exceeded the Injury; Yet the Case was very different, where it depended *upon Circumstances which were* PROPERLY and SOLELY *under the Cognizance* of the Jury, and were FIT to be submitted to *their* Decision and Estimate. And they held the Case of Criminal Conversation with another Man's Wife to be of this *latter* kind. For the Injury suffered by the Husband, and the Estimate of the Damages to be assessed must, in their Nature, depend entirely upon CIRCUMSTANCES, which it was strictly and properly the Province of the Jury to judge of: And in the present Case, the Court could not say that 500 *l.* was too much; or that 50 *l.* would have been too little.

* Mr. Justice
Foster was ab-
sent.

Note—The Case of *Chem v. Brigg*, M. 6 G. 1 B. R. before Ld. Ch. J. Pratt, was exactly similar to this; and the very same Sum of 500 *l.* was given: And the like Motion was rejected then, upon the same Principles as the Court have now rejected the present One.

MOTION DENIED.

Rex *vers.* Little.

Saturday, 3d
June 1758.

In the Crown Paper.

THIS was a *Conviction*, returned to a *Certiorari* directed to William Bailye Esq; a Justice of Peace for the City and County of Litchfield, for offering to sell Goods &c. as a *Hawker and Pedlar*,

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* P. 610. * *Pedlar*, without *Licence*, contrary to the Statute in that Case made and provided.

It was dated 24th October 31 G. 2. And set forth that One *Thomas Preston* Gentleman came before the said Justice (*William Bailye* Esq;) and gave him Information, that One *Thomas Little* (in the Writ named) after the 24th of June 1698, that is to say upon the said 24th Day of October 1757, in the Parish of St. Mary in the said City and County of the said City of *Litchfield*, was found Offering to Sale Silk Handkerchiefs, AND trading AS an Hawker Pedlar or Petty Chapman; AND that the said *Thomas Little* DID then and there OFFER to sell a Parcel of Silk Handkerchiefs; And that he the said *Thomas Little* did NOT, although required so to do, PRODUCE any *Licence*, as the Law in that Case made and provided directs, to qualify him for his said Trading: And the said *Thomas Preston* then and there prayed that he the said *Thomas Little* might be thereof convicted, according to the Form of the Statute in such Case made and provided. Whereupon the said *Thomas Little* being brought before Me, and being then and there present, and having heard the said Information read, and being charged therewith, He the said *Thomas Little* is then and there asked by me the said *William Bailye*, “ if he hath any thing to say, or can say any thing, Why he the “ said *Thomas Little* should not be convicted of the SAID Offence “ so charged upon him in Form aforesaid, according to the Form of “ the Statute in such Case made and provided.” Whereupon he the said *Thomas Little* doth now here freely and voluntarily CONFESS, before Me the said *William Bailye* the Justice aforesaid, “ That he “ the said *Thomas Little* DID offer to sell Silk Handkerchiefs to the “ said *Thomas Preston*, in SUCH MANNER as is mentioned in the “ aforesaid Information;” and “ that he hath NO Licence for selling “ thereof.” And the said *Thomas Little* is now here required by me the said *William Bailye* the Justice aforesaid, to PRODUCE a Licence granted to him to impower or qualify him to travel or trade, pursuant to the Statute in that Behalf made and provided. And he the said *Thomas Little* doth NOT produce before Me any such Licence or any Licence granted to him in that Behalf. And the said *Thomas Little* doth not pretend or alledge that he is the real Worker or Maker of the said Goods, or the Child, Apprentice, Agent or Servant of or to any such Worker or Maker: Nor doth alledge any other Matter in his Defence.

Whereupon, and upon due and full Consideration by me had, of and upon the said Matters and Premises, I do adjudge that the said *Tho. Little* is an Hawker, within the true Intent and Meaning of the Statute in such Case made and provided: And it manifestly appeareth to me the said Justice “ That the said *Tho. Little* is GUILTY “ of the OFFENCE in the said Information above laid to his Charge, “ in.

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*“ in Manner and Form as by the said Information is above al- * P. 611. ledged.”

Therefore it is considered and adjudged by me the said Justice, That the said *Tho. Little* be, and he is convicted by me OF THE SAID PREMISES in the said Information specified, above laid to his Charge, according to the Form of the Statute in that Case made and provided; And that the said *Tho. Little* forfeit the Sum of 12 *l.* for his said Offence; to be levied and paid according to the Form of the Statute in that Case made and provided. In Witness, &c.

William Bailye (L. S.)

V. 8, 9 W. 3. c. 25. § 1, 2, 3. and 9, 10 W. 3. c. 27. § 1, 2, 3. and 12 W. 3. c. 11. V. also 3, 4 Ann. c. 4. §. 1, 4. for continuing these Duties: Which refers to the Description in the former Acts.

Mr. Yates, on Behalf of the Defendant, took two Exceptions,

1st, That the Defendant is not brought within the Description of the Acts, as *going from Town to Town &c and travelling &c.*: But he is only generally described to be a Person that *traded As a Hawker and Pedlar*, and offered to sell a Parcel of Silk Handkerchiefs to the Informer.

2d Exception. That there is *no Evidence* at all of his Guilt: For it is a Conviction upon a Confession; And the Confession *extends no further* than barely to the simple Fact of offering to Sale Silk Handkerchiefs to the said *T. Preston* in *such Manner* as is charged upon him. But that Charge is an *insufficient* One.

First—He cited *1 Strange 497, 498. Rex v. Sparling*, A Conviction for profane Cursing and Swearing was held bad, for not specifying the Oaths and Curses: For the Court, NOT the Witnesses, were to judge of their being profane. So here, the Court, not the Witnesses, are to be the Judges Whether he was a Hawker, Pedlar or Petty Chapman, within the Description of the Acts of Parliament.

So, in the Case of *Colebourne v. Stockdale* there cited and reported in *1 Strange 493*; Civil Action of Debt on Bond; And Plea “ that Part of the Money was won by Gaming, contrary to the Statute;”—It was adjudged that the *Game played at*, ought to be mentioned in the Plea: For it is *Matter of Law*, and not barely Evidence. So, in Convictions for killing Game, not being qualified, The want of the due Qualifications must be *negatively* specified, And He cited the Case of *Rex v. Chapman*, 30th April 1755; A Conviction on 43 *Eliz. c. 7.* for robbing an Orchard; “ the said Robbing not being Felony, by the Laws of this Realm:” This

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* P. 612. * was holden not to be a sufficient Charge for the Court to judge upon. *Rex v. Burnaby*, 2 *Ld. Raym.* 900, 901. was a Conviction on the same Act of Parliament of 43 *Eliz. c. 7.* for cutting down Trees without mentioning the Number: And it was holden insufficient; and laid down as a Rule, that Convictions ought to be *certain* and are always taken *strictly*.

Second Exception. All the Evidence to support this Conviction is the Confession of the Party: And that is only "That he did offer to sell Silk Handkerchiefs to the said *Thomas Preston in the Maner charged* upon him in the Information." But it does not appear by the preceding Charge "That he was a Hawker Pedlar or Petty Chapman," such *as is described* by the Acts of Parliament: And if not, he cannot be liable to this Penalty.

Mr. *Luke Robinson* for the Conviction.

This Question depends, and the Conviction is founded upon the following Acts of Parliament; 8, 9 *W. 3. c. 25.* 9, 10 *W. 3. c. 27.* (which is in the very same Words, and is now in Force,) and 3, 4 *Ann. c. 4. § 4. pa. 116.*

And 1st. The Defendant is sufficiently brought *within the Description* of these Acts. The Selling Silk Handkerchiefs is only *One Overt Act* of his Trading, which is specified by the Conviction. And the *Justice* of Peace is to judge Whether the Person is or is not a Hawker or Pedlar or Petty Chapman. And He has adjudged him to be a Hawker *within* the true Intent and Meaning of the Act of Parliament.

2^{dly}. The Defendant has confessed the Charge, *as laid*; and that He had no Licence &c. If he had any Defence, he ought to have made it, before the Justice.

And these Convictions upon the *Revenue-Laws* ought *not* to be taken *so strictly* as others. For which, he cited what is laid down in 1 *Ld. Raym.* 581. *Rex v. Chandler. Per Holt Ch. J.* "That the Justices are not confined to legal Forms, in these Cases: It is enough to pursue the *Intent* of the Act."

And the Court will *presume* the Conviction to be right, unless the contrary appears upon the Face of it. And so is 1 *Strange* 608. *Rex v. Theed*: Where the Court *presumed* that the Officer came by Day, and not by Night; because no such Thing as Coming in the Night was apparent upon the Face of the Conviction.

And

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* And He alledged that Mr. *Yates's* Cases are not *ad idem*. In * P. 613. Game-Convictions it is not necessary to set out negatively, "That he had *not* such and such Qualities." Nor is it necessary to set out the particular Oaths and Curses, in Convictions for profane Cursing and Swearing: Nor in *Chapman's* Case, was it necessary to set out that it was not Felony by Law.

Mr. *Yates* in Reply.

1st. Urged the Necessity and Reasonableness of specifying the Act of Trading &c in the Conviction. But this Man was *not*, in Fact, *within the Definition of going from Town to Town, and travelling*: For he resided at a *fixed Place*.

In Game-Convictions, it is necessary to *specify negatively* and *particularly*, "That the Defendant was *NOT* so and so qualified."

Mr. Just. DENISON—That has been so settled.

Mr. *Yates* proceeded in his Reply.

2dly. The Confession is only "That he did offer to sell Handkerchiefs &c:" Not "That he *TRADED as a Hawker Pedlar* or Petty Chapman."

Lord MANSFIELD. The Act of 3, 4 *Ann.* refers to the Descriptions in those of *W. 3.*

A SINGLE Act of selling a Parcel of Silk Handkerchiefs *to a particular Person*, is not a Proof that he was SUCH a Hawker Pedlar or Petty Chapman, as ought to take out a Licence, by Virtue of these Acts of Parliament.

Now it is certainly of the ESSENCE *of the Crime* "of NOT PRODUCING a Licence," That he must be SUCH a Person as OUGHT *to take out a Licence*.

And the Confession is only of the Fact, "That he sold the Handkerchiefs *to Thomas Preston*:" Not "That he *TRADED as a Hawker &c.*"

Convictions ought to be taken *strictly*: And it is reasonable that they should be so; *because* they must be taken to be true, against the Defendant; and therefore ought to be construed with *Strictness*. I do not say that it is necessary to *define exactly, What a Hawker Pedlar or Petty Chapman is*. But it is necessary to alledge and shew that he sold the Goods, or traded, *As One*.

Mr.

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* P. 614. * Mr. Just. DENISON concurred, for the same Reasons; and thought the *Material* Averment to be here *wanting*; it not being averred "That he was *such* a Hawker Pedlar or Petty Chapman as " ought to take out a Licence."

And He mentioned a Case of *Rex v. Gardiner*, *Tr.* 1738, 11, 12 G. 2. B. R. Where the Justice convicted a Man of keeping a Gun, BEING an Instrument to destroy Game. And so it certainly was: But, in Fact, the Man had never used it *as such*; but only to keep Pigeons off from his Grounds. And the Conviction was quashed.

Mr. Just. WILMOT concurred clearly, for the same Reasons. For certainly a Man may sell Goods *as* a Hawker Pedlar or Petty Chapman, without being *such* a Person as is *obliged* to take out a Licence. And *if* he is not obliged to *take out* a Licence, most undoubtedly he ought not to be convicted in a Penalty for *not* PRODUCING One.

Now here, it appears to Me that the Justice has convicted the Man of an Offence, of Which He has not proved him to be guilty.

* Mr. Justice
Foster was not
present.

Per Cur. * unanimously,
CONVICTION QUASHED.

Tuesday, 6th June 1758 Doe on the Demise of Hitchings and another *vers.*
—Lewis Esq;

THIS was a Special Case from the Assizes, upon an Ejectment brought by a Tenant against his Landlord, who had formerly obtained a Judgment by Default, in a former Ejectment brought by Him against this same Tenant.

The Special Case stated for the Opinion of the Court was as follows.

Thomas Lewis, being seised in Fee, demised to *John Hitchings* (in Consideration of a Fine &c. of 49 *l.* 13 *s.* 6 *d.*) To hold for 99 Years, if Three Persons should so long live; at 11 *l.* 5 *s.* payable at *Michaelmas* yearly; subject to a Proviso that if the Rent should be in Arrear &c. for the Space of one Month, being lawfully demanded; and no sufficient Distress upon the Premises &c &c; That then it should be lawful to the said *Thomas Lewis* his Heirs and Assigns, to re-enter &c.

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*That *John Hitchings*, the Lessee, entered and was possessed &c; * P. 615. And then died; having first made his last Will and Testament &c; Whereby he devised the said Term to his Son *Edward Hitchings* (the Lessor of the Plaintiff;) and made his Wife Executrix. The Testator's Wife, his Executrix, duly proved the said Will and duly assented to the Legacy: And the said Devisee *Edward Hitchings*, the Lessor of the Plaintiff, entered into the Premises, and became possessed of the said Term, being then and still unexpired; and continued in Possession, till the 15th of *April* 1737.

Thomas Lewis, the original Lessor, by his Will, &c, devised to several Trustees, &c, in Trust for *Morgan Lewis*, an Infant &c. The said *Thomas Lewis* died seised &c: And the said Devisees in Trust became seised &c. And there being 3 Years Rent due and in Arrear from the said *Edward Hitchings* for and upon the Premises, a Declaration in Ejectment was served upon the said *Edward Hitchings*, UNDER and BY VIRTUE of the Statute of 4 G. 2. c. 28. for the said Premises, on the Demise of the Trustees and Devisees aforesaid; And Judgment was obtained thereupon, by Default, against the CASUAL Ejector; and a Writ of Possession issued thereupon; And Possession was delivered according to the said Writ, to the said Trustees, on the said 15th of *April* 1737: Which said Trustees have been in Possession of the Premises ever since. And the said *Edward Hitchings* (the now Lessor of the Plaintiff) has not since paid nor tendered the Rent in Arrear or any Part thereof, nor the Costs; nor filed any Bill for Relief in Equity.

On the Trial of this second Ejectment now brought by *Edward Hitchings* against the said *Lewis*, no Affidavit was PRODUCED, "That half a Year's Rent was due before the first Declaration in Ejectment was served upon the said *Edward Hitchings*; and that no sufficient Distress was to be found on the demised Premises, countervailing the Arrears then due; And that the Lessors in that first Ejectment had Power to re-enter."

On this Trial of the said second Ejectment, viz. the Ejectment brought by the said *Edward Hitchings*, A Verdict was found for the Plaintiff; but subject to the Opinion of this Court, "Whether or no the Plaintiff therein ought to recover."

"Whether *Edward Hitchings* the Lessor of the Plaintiff in the present Ejectment ought to recover, or not;" depended upon the following

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- * P. 616. * Question: *Viz.* "Whether it was necessary for the Defendant
" Mr. *Lewis* to PRODUCE an *Affidavit* That, Half a Year's Rent
" *&c. ut supra*; And that the Lessors in that former Ejectment had
" Power to re-enter."

Mr. *Nares*, who argued for the Plaintiff, made two Questions: *viz.*

1st. How far this Case is within the 2d Section of 4 G. 2. c. 28.
" for the more effectual preventing Frauds committed by Tenants,
" and for the more easy Recovery of Rents *&c.*"

2d. Question. If it is within it, then how far the Plaintiff has
proved his Title under that Statute, upon the particular Circum-
stances of this Case.

The First Point may be rendered the more clear, by considering
how it stood before the Statute; and how since.

1st. *Before* that Statute, the Plaintiff in Ejectment must have
proved "that there was Rent in Arrear;" and "that there was
" no sufficient Distress to be found upon the Premises;" and,
thirdly, "that he had made a lawful Demand of the Rent in
" Arrear."

This Condition here annexed to the Lease in the present Case,
is in Derogation of the Party's own Grant, and tends to defeat the
Estate: And therefore Mr. *Lewis* would have been kept strictly to
prove all these previous Facts. And if it had been a Judgment
against the *Casual* Ejector; the Judgment would have been no Bar
against the *real* Tenant, in an Action of the *mesne Profits*. Indeed
if the Judgment had been obtained against the *Real* Tenant, or
against the *Owner* of the Estate, the Person who obtained such a
Judgment needed not prove any Thing over again, in an Action for
the *mesne Profits*. And so the Lord Ch. J. at *Nisi prius* at *Guild-*
hall, in 2 *Strange* 960. *Jefferies v. Dyson*, * expressly lays down this
Distinction. And here the *real* Tenant did not enter into the Rule:
But it is *res inter ALIOS acta*.

* See this Case stated at large, by Mr. Justice Denison, *post*.

This Judgment in Ejectment had therefore (before the Statute)
no Relation to the *real* Tenant: And consequently, Mr. *Lewis* must
have *shewn his Title* to re-enter.

Then, to consider the Case as *subsequent* to the Statute, here is
not an Acquiescence of 20 Years. And what seeming Acquiescence
there was, arose from the Poverty of the Party.

2dly.

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*2dly. The next Point in Question is, "Whether according to * P. 617.
" the State and Circumstances of this Case, it can be considered
" as a Case *within* the Statute; and that the Plaintiff has proved a
" Title *under* the Statute."

The Court will *not presume* any Thing, in Support of a Judgment obtained by Confession or Default, or in any other Way than upon a *Trial of the Merits*. *Skinner* 586. *Sanders's Case* is a Proof of this: Where *Holt Ch. J.* makes the like Distinction.

An Inconvenience would arise from too great a Latitude in construing this Statute. As in Case of *Fraud and Connivance*, in recovering the Judgment against the Casual Ejector: It would be very hard, if in *such* Case, the real Tenant could not bring an Ejectment.

Mr. *Nares* was now departing from the Facts stated in the Case; in which he said it was omitted to be inserted "That
" there *was* sufficient Distress."

LORD MANSFIELD—We must judge upon the Case *as stated*: if it is mis-stated, You must apply to amend it. However, I do not see that this would be very material.

He observed that it was also stated, only, "That no Affidavit
" was PRODUCED: Not "That there *was* no Affidavit *at*
" *all*." Also that Presumptions are not dependant upon certain fixed Rules; but must be guided by Circumstances: And such Circumstances are proper for the Consideration of a Jury.

Here was an Acquiescence of 20 Years within a few Months. And it is stated to be a Case "*within* the Act of Parliament;" Which is a material Part of the Case. The Ejectment is stated to have been served "*under and by Virtue* of this Act."

Mr. *Morton* was beginning to speak on Behalf of the Defendant: But

Lord MANSFIELD told him that the Case was so clear on his Side of the Question, that it was not necessary for him to give himself any Trouble.

Then His Lordship repeated the Case exactly as it was stated: (Which see, *ante pa.* 614, 615.)

The

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* P. 618. *The General Question “Whether the Plaintiff in this last Ejectment ought to recover,” depends upon this particular Question, viz. “Whether the first Ejectment was *regularly* brought and “proceeded upon, by the Trustees under *Thomas Lewis’s* Will, “pursuant to the directions specified in the Act of 4 G. 2. c. 28. “§ 2.” This last Ejectment is brought near 20 Years after the former.

Now, besides the GENERAL *Presumption* “That the Proceedings were regular and *omnia solemniter acta, unless* something “had appeared to the contrary;” and the Rule “That *stabitur* “*præsumptioni, donec probetur in contrarium;*” Here is, in this Case, a DECISIVE *Fact* stated: Which *Fact* is “That the Proceeding under the first Ejectment was UNDER and BY VIRTUE “of this *Act* of Parliament.”

Indeed *Edward Hitchings* was in Possession, as appears by the Case stated till the 15th of April 1737. the Time when Possession was delivered (by Virtue of the Writ of Possession) to the Trustees. So that, being the Tenant in Possession, he MUST have been served with the Declaration in Ejectment; Whether it was a Common Law-Proceeding, or a Proceeding upon this Act of 24 G. 2.

But the Case itself states it to have been a Proceeding UNDER this *Act*: And if it was so, the Judgment MUST have been founded upon such an Affidavit as that Act expressly directs and requires, viz. An Affidavit “That half a Year’s Rent was due, before the “Declaration in Ejectment was served; and that no sufficient Distress was to be found upon the demised Premises, counter-vailing the Arrears then due; And that the Lessors in that Ejectment had Power to re-enter.”

And the Case does not state, affirmatively, “That the Judgment “was irregular;” or, expressly and explicitly, “That there was “No Affidavit at all;” or indeed any Thing whatsoever, to TAKE OFF a *Presumption* which is *immensely strong* the other Way. For *Edward Hitchings* acquiesced under this Judgment, Execution, and Possession, for almost Twenty Years, and never tendered the Rent and Arrears, together with Costs (pursuant to the Act;) nor filed any Bill for Relief in Equity, within six Months after the Execution executed, nor indeed at any subsequent Time. So that he is barred by the Statute, and fore-closed from all Relief or Remedy in Law or Equity, (other than by Writ of Error,) and the Landlord is by Virtue of the Act of Parliament to hold the Premises discharged from the Lease; upon Supposition that his former Proceedings were regular.

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*The Affidavit may be *lost*, after this Length of Time; Or the * P. 619.
Landlord may be unable to *come at* it; although there were, in Fact,
a proper One made, to support his Judgment and Execution: And
it would be too hard, to put the labouring Oar upon the Landlord,
of PROVING *the Regularity* of all the Circumstances upon which his
Judgment and Execution were founded.

As to what has been suggested (*v. ante* 617,) “ That there may
“ be *Fraud Connivance*, or *Collusion* with the Under-tenant, in
“ the Manner of Recovering Judgment against the Casual Ejector;”
It is merely imaginary, in the *present* Case. Besides, *Fraud will*
infect every Thing: And upon the Principles of *Fermor’s Case* 3 Co.
77. it would not stand.

There can be no Suspicion of any such Thing here. For this
Edward Hitchings, the present Lessor of the Plaintiff, the Person
who has thus long acquiesced under this Judgment and Execution,
and never attempted to be relieved from it either at Law or in Equity,
is Himself the VERY MAN *upon whom* the Declaration in the first
Ejectment was served.

The true End and professed *Intention of this Act* of Parliament
was to *take off* from the Landlord the Inconvenience of his conti-
nuing always liable to an Uncertainty of Possession, (from it’s re-
maining in the Power of the Tenant to offer him a Compensation
at *any Time*, in order to found an Application for relief in Equity;) and to *limit and confine* the Tenant to Six Calendar Months after
Execution executed, for his doing this; or else, that the Land-
lord should from thenceforth hold the demised Premises discharged
from the Lease.

His Lordship was therefore clearly of Opinion “ that in this
“ Case, the Plaintiff ought *not* to recover.”

Mr. Just. DENISON concurred in Opinion “ That the Plaintiff
“ had *no* Title to recover.”

The former Ejectment brought by the Landlord against *Edward Hitchings* the Tenant, who is now become Lessor of the Plaintiff in the present Ejectment, is stated to have been served upon *Hitchings* “ *under and by Virtue of* this Act of 4 G. 2. c. 28.” Now this Act (*v. § 2.*) expressly recites “ That great Inconveniences frequently
“ happen to Landlords, in Cases of Re-Entry for Non-Payment of
“ Rent, from the many Niceties attending Re-Entries at *Common*
“ Law; and that Expences and Delay often happened from In-
“ junctions out of Equity, after Judgment in Ejectment:” And the

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* P. 620. * Act is professedly made in order to prevent these Inconveniences. It prescribes a Method of Proceeding, in *two* Cases or Manners of recovering upon the Proceeding in Ejectment which it directs; *viz.* One, in Case of Judgment against the *Casual* Ejector; the Other in Case of it's Coming to a *Trial*. In the *former* Case, of Judgment against the *Casual* Ejector, (and so also upon Non-suit on not confessing Lease Entry and Ouster,) it directs "That it shall be *made* " *to appear* to the Court where the Suit is depending, by AFFIDAVIT, That half a Year's Rent was due before the Declaration was served; and that no sufficient Distress was to be made upon the Premises, countervailing the Arrears then due; And that the Lessor or Lessors in Ejectment had Power to re-enter:" In the *latter* Case, (of it's Coming to a Trial,) the same Thing must be *proved upon the Trial*.

The present Question is upon a Judgment of the *former* Kind, *viz.* against the *Casual* Ejector, by Default; and upon an Ejectment brought UNDER and BY VIRTUE of *this Act*. And We must *take and presume it to be a right, regular, and good One*; as nothing appears to the Contrary.

And this Case is not at all like the cited Case of *Jefferies v. Dyson*, 2 *Strange* 960. Where "in an Action *for mesne Profits*, " the Plaintiff offered a Recovery in Ejectment against the *Casual* Ejector; upon which no Writ of Possession had issued: And " when the Defendant would have gone into the *Title*, the Plaintiff insisted that he was *estopped* from doing so, by the Judgment against the *Casual* Ejector." But the Ch. Justice held "That " though it would have been an Estoppel, if the then Defendant " had been made a Defendant in the Ejectment, and the Verdict " *against HIM*; yet that *that* Judgment to which he was no *Party* " could be no Estoppel to *Him*," And therefore the Ch. Just. admitted the Defendant to controvert the Title. And that Distinction is right, *there*: But it is not like the present Case.

I am of Opinion the Plaintiff here has no Title.

Mr. Just. FOSTER was of the same Opinion.

The Judgment is certainly good, *till* set aside. The present Objection, " of the not producing such an Affidavit," is grounded upon the Act of 4 G. 2. c. 28. And that Act *does require* such an Affidavit: And *for that very Reason*, We must *presume* "That " *there was* such a One *made*; and that the Judgment was founded " *upon it*." But the Plaintiff in that Ejectment has it not: It remains in Mr. Cowper's Office.

Clearly,

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* Clearly, the Plaintiff has no Title.

* P. 621.

Mr. Just WILMOT also concurred.

He said it would be unreasonable that the now Plaintiff should recover from the Landlord, after almost 20 Years Acquiescence; and after the Landlord may have improved the Estate.

He also agreed to the Case of *Jefferies v. Dyson*; But denied it to hold in *this* Case.

This Act was made to compel Lessees to bring their Ejectment, or their Bill in Equity, WITHIN a LIMITED Time. And this is stated to be a Proceeding "*under and by Virtue of that Act.*" Therefore there *must have been* such an Affidavit, though the present Defendant did not produce it.

Per Cur. unanimously,
JUDGMENT for the DEFENDANT.

Rex *vers.* Inhabitants of Painswick.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT CASES, N^o. 148.
p. 465.

Wednesday,
7th June
1758.

* Cottingham *vers.* King.

* P. 623.

Pasch. 31 G. 2. Rot'lo 179.

Friday, 9th
June 1758.

THIS was a Writ of Error brought upon a Judgment of the Court of King's Bench in *Ireland*; who had affirmed a Judgment in Ejectment given for the Plaintiff by the Court of Common Pleas there, after a general Verdict for the Plaintiff.

In this Ejectment, the Parcels are described to be (amongst Others therein mentioned and included) 5000 Messuages, 5000 Cottages, 10,000 Acres of Land, &c; in all those the Lordships, Manors, and late-dissolved Abbey or Monastery of *Boyle* and *Infemacranaw*; and

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* P. 624. * and QUARTER of Land of *Tallagh*, with the TOWN and TENEMENT of *Boyle*, and *Fairs* and *Markets* thereunto belonging, in the COUNTY of *Roscommon*; And all those the Lands and Hereditaments called *Grangemore*, (with many other Parcels, described by the Name of QUARTERS, some containing so many, others so many Acres;) and *part of Sumternat*, &c; a large *Deer-Park* &c; and the Parsonage of *Longford* &c; in the COUNTY of *Roscommon*; and a small Park or Field, in the *Possession of* &c.

On this Ejectment, there had been (as is above mentioned) a General Verdict for the Lessor of the Plaintiff; and Judgment for him, in *C. B. in Ireland*. And afterwards, A Writ of Error was brought upon it, in *B. R. in Ireland*: And General Errors were assigned. The Court of *B. R. in Ireland* affirmed the Judgment of the Court of *C. B.* there. And upon this Judgment of Affirmance, the present Writ of Error was brought.

Many Exceptions had been taken in *Ireland*, on the Part of the Plaintiff in Error, upon the Writ of Error brought in the King's Bench there. But

Mr. *Ashurst*, who argued for the Plaintiff in Error here, said he would now only take Exception to the UNCERTAINTY of the Description of the Premises specified in the Declaration: Whereas in Ejectment there ought to be a *sufficient Certainty*; that the Sheriff may know how to deliver Possession. 1 *Brownlow* 142. *Challener v. Thomas*: "An Ejectment will not lie, *De Aquæ Cursu*." 1 *Ld. Raym.* 277. *Shalmer v. Pulteney*, seems to concede that an Ejectment will not lie "*de quodam Ædificio*;" for the Uncertainty of the Term *Ædificium*. In *Style* 30, It was doubted whether an Ejectment lies "*de uno Crofto*." *Dyer* 84. *b.* in Affize "*de quadam portione Decimarum* &c," It was objected that the Plaintiff was uncertain.

This is an entire Judgment, and *entire Damages*: And it is particularly liable to Exception, in the following Instances; viz.

1st. Exception 1st. *No Vill* at all is mentioned throughout the whole Declaration: The Lands &c are only described to lie (generally) "in the County of *Roscommon*:" This Defect runs through the whole Declaration.—*Cro. Eliz.* 822, *Gray v. Chapman*, is in Point; and by the whole Court: "The Declaration in Ejectment was holden ill, for not alledging in what Vill the Tenements were." *Hob.* 89. *Rich v. Shere*, is most expressly in Point: And the Judgment was, for this very Cause, reversed in *Cam' Scacc'*. 2 *Barnes*, 150. *Goodright, on the Demise of Griffin v. Fawson*: The Judgment was arrested for the same Uncertainty, "in which of two Parishes the Messuage stood."

2d.

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*2d. The Words are—"With the *Town* and *Tenement*, of *Boyle* * P. 625.
"and *Fairs* and *Markets* thereunto belonging." Now Ejectment ^{2d Exception}
will not lie for a *Town*; nor for a *Tenement*, generally. 1 *Sid.* 295.
Birbury v. Yeomans: Ejectment "*de 7 Messuagiis sive Tenementis*,"
was holden ill, after a general Verdict. *Cro. Eliz.* 186. *Wood v.*
Payne was the same Determination, in an Ejectment "*de uno Mes-*
"*suagio sive Tenemento*." 1 *Lord Raym.* 191. *Copleston v. Piper*:
The two *Powells* Justices said, and *Treby* Ch. J. agreed, That Eject-
ment "*de uno Tenemento*" is ill, for the Uncertainty. 2 *Strange*
834. *Goodtitle v. Walton*—: After Verdict for the Plaintiff in Eject-
ment, Judgment was arrested; And it was holden That an Eject-
ment "*de uno Tenemento*" will not lie. 1 *Barnes* 117. *Makepeace*
v. Hopwood: Judgment in Ejectment was arrested for the Uncer-
tainty of the Words "*One Messuage or Tenement*."

3d Exception.

3d. "*A Quarter*" is another Term used in the Declaration:
Which Term is totally *uncertain*; and even appears to consist
of different Numbers of Acres; some, more; some, less. *Yelv.* 117.
St. John v. Commyn—: Ejectment "*de Castro villa et terris de Kil-*
"*brough in Com' &c.*," was holden insufficient for want of expressing
the Number and Certainty of Acres. And that Case is like the
present; Which is "*the Lands called &c.*:" but they are described
by the Name of "*One Quarter &c.*:" Which Term does not con-
vey an Idea of any determinate Number of Acres.

4th. It is of "*Part of S. M. & D.*:" Which is absolutely un- ^{4th Excep-}
certain and vague. ^{tion.}

5th. And of "*a large Deer-Park in the County of Roscommon*:" ^{5th Excep-}
Which is vastly too uncertain and indeterminate. ^{tion.}

6th. "*Of a small Park or Field, in the Possession of &c; not* ^{6th Excep-}
specifying WHERE. 11 *Co.* 55. *Edward Savel's Case*: Ejectment ^{tion.}
of "*a Close called Dove-Cote Close, containing 3 Acres.*" The
Judgment was arrested, for not specifying what Nature and Qua-
lity the three Acres were of. 1 *Showers* 338. *Knight v. Symmes*:
Ejectment of "*5 Closes of Pasture and Meadow, called Faldowne,*
"*containing ten Acres:*" But did not distinguish how many of
One, and how many of the Other. Judgment was arrested, after a
Verdict for the Plaintiff; for want of sufficient Certainty. 1 *Salk.*
254. *S. C.*: And *Holt* Ch. J. is there said to have affirmed *Savel's*
Case for Law.

7th. The *Quantity* and *Quality* of the Lands is not sufficiently ^{7th Excep-}
shewn. ^{tion.}

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* P. 626. *Therefore, for these Exceptions, He prayed to reverse the Judgment of the Court of King's Bench in *Ireland*.

Mr. *Williams*, who argued for Sir *Edward King*, the Defendant in Error, said That the Merits of the Title to this Estate (an Estate of 8000 *l. per Ann.*) came in Question in *C. B.* in *Ireland*; Where Lord *Kingborough's* pretended Will was found to be a Forgery: And the Court of King's Bench there affirmed the Judgment of *C. B.* there. And being *after a Verdict* upon the *Merits*, the Court here will *presume* what they can in *Favour* of the Judgment,

And as to the Exceptions——

1st. “ 5000 Messuags, 5000 Cottages &c &c, in the *Lordships* “ *and Manors* of &c late belonging to the dissolved Abbey or Monastery of &c in the County of *R.*” is sufficient without naming any Vill. For a *Manor* is as notorious in it's Boundaries, as a Parish: So also is a Lordship.

The “Parish of *A. or B.*” has been holden sufficient. For Proof of which, he cited a Case (which does not perhaps quite prove it;) viz. 3 *Lev.* 334. *Goodwin v. Blackman*: Which was an Ejectment of Lands in *K. & G.* whereas the whole lay in *K.*

And *after a Verdict*, this *Manor* shall be intended to be a Vill. “*Parish*” shall be intended to be a Vill, *prima facie*. 2 *Salkeld* 501. *Rudd v. Moreton*—: It is said to have been so adjudged in the Case of *Wilson v. Laws*, in *M. 6 W.* 3.

And if a Place be named *generally*, that Place shall be taken to be and intended a Vill—This was adjudged, (as is also said in 2 *Salk.* 501.) in the Case of *Vinckleston v. Ebdon*, *M. 10 W.* 3. *B. R.*

2dly. As to Ejectment not lying for a *Town*, or for a *Tenement*—

After a Verdict, the Court will intend the Lands to be *Parcel of the Township*: And they shall pass with it. And to support this Position, he cited *Cro. Car.* 168. *Gennings v. Lake*; Where the Court conceived that the Land might be said to be *appendant* to the House. 3 *Keble* 44. *Smith v. Martyn*; Where a Garden was allowed to be demisable, as *Parcel* of a Messuage. *Doe, ex dim' Saville v. Borlace et al'* determined in the House of Lords (on a Judgment in the Exchequer) 11 *March* 1735: (Which he cited from the Respondent's Case, upon the 4th Exception,) “That the “ *Advowson* and *Common* should be intended to have been ap-
“ *pendant*

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“ * *pendant* to the Manor.” So here, the Lands may pass as *appen-* * P. 627.
dant or *belonging* to the Township; though not alledged to be *Part*
of it. So, “ *Communia Pasturæ*” generally, shall, after Verdict,
be *intended* to be *such* Common, for which an Ejectment will lie,
as Common *appendant* or *appurtenant*. 1 *Strange* 54. *Newman*
v. Holdmyfast is expressly so determined. And an Ejectment will
lie for a *Town*; and also for a *Tenement*, where it is reduced to a
Certainty.

Most of Mr. *Ashurst's* Cases are in the *disjunctive*; “ *Messuages*
“ *or Tenements.*” However, here the Word “ *Vocato*” renders
it certain enough. 1 *Lev.* 65. *Lady Dacre's Case*: *Twyfden* said
that though an Ejectment will not lie of a Croft; Yet it will lie of
“ a Croft called *Black Acre.*” 1 *Siderf.* 295. *Burbury v. Yeomans*:
He repeats the same Assertion. And in both Places, He gives the
Reason; *viz.* “ That this renders it *certain.*” And here, it is
“ the Town and Tenement of *Boyle*:” Which Appellation of it by
it's Name, ascertains it sufficiently. And this is agreeable to what
is said in 3 *Mod.* 238. *Hexham v. Coniers*; “ That the adding *VOCAT.*
“ the *Black Swan*, to the Words *Messuagium five Tenementum*, makes
“ it certain that the Tenement intended is a *House.*”

And the old Rule about the Sheriff's being necessarily to be in-
formed so exactly *upon the RECORD*, “ What he is to deliver Pos-
“ session of,” is now out of Use, and is not to be regarded: For
the Plaintiff in Ejectment is to take Possession, *at his Peril*, ac-
cording to his *own Shewing*. *Savile* 28. *Case* 67. *Queen v. Ayle-*
worth: *Manwood*, Chief Baron, expressly declares this; and says
“ It was the Opinion of the Chief Justices in the Star-Chamber.”
1 *Strange* 695. *Sullivan v. Segrave*—An Ejectment “ *de parte*
“ *Domus,*” was holden sufficient, upon the same Principle. 2 *Ld.*
Raym. 1470 *Bindover v. Sindercomb*: An Ejectment of “ *Part* of
“ a Mote, *Parcella Areae, Parcella Pomarij &c.*” was holden good,
upon Error, after Verdict. 2 *Ld. Raym.* 789. *Camell v. Claverling*:
An Ejectment was brought in the Exchequer, “ *de minutis Deci-*
“ *mis*:” And, after Verdict and Motion in Arrest of Judgment,
Judgment was given for the Plaintiff, by all the Barons. 1 *Salk.*
255. *Whittingham v. Andrews*: Ejectment “ *de mineris Carbonum,*”
(generally,) without shewing the Number of Mines, was holden
good, in *Durham*, where the Course was so, and of which the
Court took Notice. And so the Court will take Notice of the
Kingdom where *this* Ejectment was brought: And * *Eight* of the
Judges there have determined this to be a sufficient Description, in
that Country; And this Court will *give Credit* to them. 2 *Keb.* 745.
† *Jane v. Polyxphen*: The Court conceived an Ejectment brought
in *Ireland*, of “ 20 *Villis et Terris,*” to be good. *Cro. Car.* 511.
Mulcarry et al' v. Eyres et al': An Ejectment in *Ireland*, “ of 100
Acres

* So he said:
But they
could not, in
Ireland, be so
many as
Eight.

† This Case
was adjourn-
ed.

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* P. 628. “ *Acres of Bogge, in *Villis et Territoriis* de D. S. & V.” was hold-
en good. 1 *Strange* 71. *Ld. Kildare v. Fisher*: An Ejectment of
“ 100 Acres of Mountain,” was held good in *Ireland*. And this
last mentioned Case was a solemn and unanimous Judgment, after
consulting the Lord Chancellor and Judges of *Ireland*.

3dly. As to the Term “Quarter”—The Case cited from **Yelv.*
117. is not the Determination of the Court: Nor was that the
Point before them. And “a Quarter” is a known Description in
Ireland: Every Child knows them. That Country was divided
into Quarters, when *Ld. Strafford* was *Ld. Lieutenant* there.

* It is report-
ed to be *per*
Curiam; and
with a *Nota*
bene, too.

As to the 4th, 5th and 6th Objections. His Answer was, That
they *All* belong to the Township: And besides, they may be the
Names of the Closes.

7thly. And as to the last Objection—He insisted that the Quan-
tity and Quality of the Lands are sufficiently set forth: And then an-
swered the Cases cited on the other Side. As to *Savel's* Case—That
Case was doubted in *Ld. Raymond's* Time; and has been since
disallowed, or at least called in question. *V. 2 Ld. Raym.* 1472.
Bindover v. Sindercombe. Comberb. 198, 199. *Knight and Symms*:
Per Eyres Just.—The latter Opinions are against *Savel's* Case:
Though the Chief Justice indeed there says “That an Ejectment
“ ought to be as certain as a *Præcipe quod reddat*.”

Mr. *Ashurst*, in Reply—I know Nothing of the *Merits* of this
Case: I am only to argue upon the *Record*.

2d Exception. These Premises cannot possibly be intended to lie
within the *Township* of *Boyle*: They are only described generally, to
be within the *County* of *Roscommon*. I say that an Ejectment will
not lie of the *Town* and *Tenement itself*: Therefore, consequently,
neither will it, of these Premises *as belonging* thereto.

Possession must be delivered at the *Peril* of the *Sheriff*, as well
as of the Plaintiff. “*De parte Domûs*” is much less uncertain, than
an undefined Part of a great *Estate*. I agree that if the Description
be *known* in *Ireland* it is enough. But I say that *this* Description is
every where uncertain.

3d Exception. In *Yelv.* 117. The Point for which it is cited, is
taken † also into Consideration, as well as the Principal Objection.

† Not directly
and princi-
pally, indeed;
but positively
and explicitly.

LORD MANSFIELD—This is *after a Trial and Verdict* in *C. B.*
in *Ireland*: And the Objection is, the *Uncertainty* of the Claim or
Description of the Premises in the Declaration.

In

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*In a *Præcipe* in a real Action, which is a *formed* Writ, Preci-* P. 629.
sion is requisite : Because it was necessary to follow the Form prescribed by the Register.

Whilst Ejectments were compared to real Actions, and Arguments were drawn from Analogy with them, they must be, of Course, *fettered* : And this was so, till after the Reign of King *James* the First. But of *later* Times, an Ejectment has been considered with more Latitude ; as a Fictitious Action to try Titles with more Ease and Dispatch, and less Expence.

Even in a *Præcipe*, I do not know whether the Sheriff could always be quite certain, *Which* were the particular Acres &c, of which he was to deliver Possession. But in this *fictitious* Action, the Plaintiff is to *shew* the Sheriff ; and is to take Possession *at his Peril*, of *only* what he has Title to : If he takes more than he has recovered and shewn Title to, the Court will, in a summary Way, set it right. So that such a very exact Description is not equally necessary in *this* Action, as in a *Præcipe*.

However, there are in this Case, (as it is particularly circumstanced,) two Things, which carry it much farther than the general Case of Ejectments, and are decisive : For it is *after Verdict* ; and it is *from Ireland*. The Title has been *tried* by a *Jury* of *Ireland*, where the Lands lie ; Evidence has been given to them, upon which they have found for the Plaintiff ; and *Two Courts there* have given Judgment for the Plaintiff, without Difficulty.

The Denominations of Land may be certain and known *there* ; though unknown *here* : For Words and Names are arbitrary. Ejectments have been brought *there*, of *Mountain*, of *Bogg* ; nay of *Mountain in a Bogg* : And a Certificate has been given by Judges of *Ireland*, that the Term "*Mountain*" does not necessarily include Situation but describes *Quality* ; that Fines, Recoveries, Writs of Dower, and Settlements of it, are frequent there ; and Ejectments *usually* brought of it.

And *there*, it is frequent to describe the Lands of great Estates, even in their Settlements, by "*Towns*." I know this, of my own Knowledge.

Ireland was planted and settled by Degrees, both formerly and lately ; And *Towns* came, by Degrees, to be known and certain Descriptions : And so, "*Quarters*" might be, after *Cromwell's* Settlements there, and the Division of it into Quarters. "*Town*" and "*Tenement*", are here used as synonymous Terms.

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* P. 630. * However, the Jury of *that* Country understood it; and the Two Courts of *that* Country understood it, and have made no Difficulty about it: And therefore I am sure I will not, *after* this, say “ that “ it is not to be understood.”

Mr. Just. DENISON was of the same Opinion “ That the Judgment ought to be affirmed:” And He held the Descriptions to be sufficient.

In a *Præcipe quod reddat*, it was necessary to describe the Lands formally, once: But it is *not* so, in an *Ejectment*.

I take this present Ejectment to contain, first, a general Description, which takes in the Whole: And afterwards, the Estate demanded in it, is described particularly and in Parcels, “ *what* it consists “ of.” This was settled in the Case that has been mentioned, *Doe ex dimiss. Savill v. Borlace, Tr. 9 G. 2. in Cam’ Scacc’*;” (which I argued.) It was after a Verdict; and was an Ejectment for Tithes of various kinds: And two Things were there holden; 1st. That being after Verdict, it was to be *intended* as brought of *such* Tithes *only*, for which an Ejectment would lie; and 2dly. that there was no Objection to a *bis petitum* in an Ejectment. And so here, I take it that this Manner of describing the Premises is a *bis petitum*, a second Description of the same Thing.

And as to the Cases that have been urged in Support of the Objections—There has been a greater Latitude of *late* Years, than *formerly*: Whatever Strictness was used at first, it is certain that Ejectments are *now* considered upon a more *liberal* Foot. “ *Town*” appears, by what has been said, to be a common and known Description in *Ireland*. “ *Mountain*” also appears to be a known Description *there*: And Fines, Recoveries, Writs of Dower, Ejectments and Settlements use it as such. In the Case of *Ld. Kildare v. Fisher*, the Case of *Holbourn v. Babington in Dom’ Proc’* is said to have been reversed upon another Point: And They gave Credit, in that Case of *Ld. Kildare v. Fisher*, to the Certificate of the *Irish* Chancellor and Judges.

And “ *Quarter*” may be a Term as well known in *Ireland* as “ *Mountain*” is: And in this Case, I shall *intend* it to be so.

Mr. Just. FOSTER concurred, for the same Reasons.

So also did Mr. Just. WILMOT. And He added that He never could understand that Manner of Reasoning, so often urged upon Arguments of this Sort, *viz.* “ That the Description must necessarily be *so* certain that the Sheriff may be able exactly to know, “ without

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“ *without any Information from the Plaintiff, of *what* to give Possession:” Which is not true; for such Precision is *not necessary* in an Ejectment. * P. 631.

After Verdict, this Description must be *intended* to be sufficient.

Per Cur. unanimously,

JUDGMENT AFFIRMED.

Rex *vers.* Earl Ferrers.

Saturday, 10th
June 1758.

ON Wednesday 26th January 1757, Mr. Norton moved, *either* for an Attachment against the Earl, for not returning a *Habeas Corpus* already issued, and returnable *immediatè*, commanding him to bring up the Body of his Countess (Sister to Sir William Meredith;) or for a new *Habeas Corpus*, ACCOMPANIED *with an Attachment*.

He said that the latter had been done in the Case of *Rex v. Dr. Wright*, M. 5 G. 2. B. R; And that the Reason of issuing the Attachment at the same Time with the *Habeas Corpus*, was for Prevention of a Delay which might, in certain Cases, render the Remedy ineffectual. *

* This Case was not at all, as cited. See it in 2 Strange 915.

Lord MANSFIELD asked Mr. Norton, Whether He knew any Instance of an *Attachment* ACCOMPANYING a Writ. He said He understood an Attachment going, for *not having* obeyed a Writ: But did not know any Instance of an Attachment going out *together with* the Writ.

Mr. Norton stated *Wright's* Case, from a Note taken by a Gentleman who has now left the Bar; † Where *Lee*, then a Puisne Judge held it *might* be done: Though, in that Case, *Wright* did afterwards return the Writ in Court.

† The Note here relied upon was erroneous.

Note—In the present Case, Mr Justice *Foster* had granted a *Habeas Corpus*: Which was served on the Earl, by Sir William Meredith. But Sir William at length agreed not to prosecute it; on Condition that his Lordship should carry Lady Ferrers to Bath; which the Earl promised, but had not performed.

Mr. Norton said He would take Nothing by his Motion. And

Mr. Clayton moved for a *new* Writ, returnable in Court *immediatè*, Which was GRANTED.

Lord

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* P. 632. *Lord *Ferrers* neglecting likewise to obey this *second* Writ of *Habeas Corpus*, the Counsel for Sir *William Meredith* (on Behalf of his Sister) intended, on *Tuesday* the 8th of *February* 1757, to have moved for an Attachment against Lord *Ferrers*, for this his Disobedience: But some Doubts and Difficulties having been started by Members of both Houses, concerning the *Privilege of PEERAGE*; and “whether the Court of King’s Bench could issue an ATTACHMENT *against a Peer* during the Sitting of Parliament, and execute “ it upon him, ONLY for a * CONTEMPT to their Court,” Sir *William Meredith* judged it prudent to petition the House of Lords, for their *Leave* to proceed against the Earl; and accordingly, did Yesterday, (by the Hands of the Earl of *Westmorland*,) deliver such a Petition, stating the Facts. Lord *Delaware* opposed it; and said, It was too summary and hasty a Method of determining upon their Privileges; and proposed referring the Matter to a Committee, and summoning Lord *Ferrers* to answer it in his Place: And to obviate the Objections which might be made to this Method on Account of the Delay, He offered some Schemes for the intermediate Safety of the Countess. But Lord *Mansfield* answered Him, and spoke in Support of the Jurisdiction of his Court, and the Unreasonableness of Injustice and Inconvenience of allowing such a Privilege in Criminal Cases and Breaches of the Peace. The Duke of *Argyle* then spoke to the like Effect, and expressed a Surprise that there should be any Doubt about it; the Reason of the Thing being so clear and plain. Lastly, the Earl of *Hardwicke* spoke strongly and particularly in Support of the same Doctrine, and adduced many Instances and Precedents in Proof of his Positions; and concluded with proposing, that to put an End to all Doubt about it for the future, the Lords should come to a Resolution; And accordingly they did come to the following Resolution or Declaration, and Ordered it to be entered on their Journal; viz. “ 7 *Februarij* 1757. It is Ordered and Declared, That no Peer or Lord of Parliament hath “ Privilege against being compelled by Process of the Courts of “ *Westminster-Hall*, to pay Obedience to a Writ of *Habeas Corpus* “ directed to him.”

* See Bacon’s New Abridgment of the Law. Vol. 3. fo. 5. Title *Habeas Corpus*, Lord Leigh’s Case, in point; and fo. 6. express, “ That an Attachment may be granted, if the Peer refuses Obedience to the Writ: For, being a Contempt, a Peer has no Privilege.”

(And it was afterwards, viz. “ *Die Mercurij* 8 *Junij* 1757, “ Ordered and Declared by the Lords Spiritual and Temporal in “ Parliament assembled, That no Peer or Lord of Parliament hath “ Privilege of *Peerage* or of *Parliament*, against being compelled by “ Process of the Courts in *Westminster-Hall*, to pay Obedience to “ a Writ of *Habeas Corpus* directed to him.” And it was then and thereby further Ordered, “ That this Order and Declaration be “ entered upon the Roll of the *Standing Orders* of this House.”)

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* On the 8th of *February* 1757, Mr. *Norton* renewed his Motion * P. 633-
for an *Attachment* against the Earl: And he produced Affidavits
of his Lordship's Disobedience to the Writ, and continuing his ill
Usage of his Lady.

All the Affidavits (quite from the Beginning of this Affair) were
read.

LORD MANSFIELD—This is a *Habeas Corpus* at *Common Law*;
which is a Prerogative Writ, for the Liberty of the Subject. The
Court may enforce *speedy* Obedience to it: And the *Circumstances* of
this Case (where Delay may be very dangerous) require it. It is
reasonable that the Lady should have Opportunity of laying her Case
before the Court; and swearing the Peace, if She thinks proper, in
Order to obtain the Protection of the Court. The *End* of this
Course that we now take, in issuing an Attachment to enforce
Obedience to the Writ, is to have this Lady produced for this
Purpose.

And therefore We think, *under the* * EXTRAORDINARY *Cir-* * One of these
cumstances of this Case, an *Attachment* should issue; *to enforce Obe-* was detaining
dience to this Writ of *Habeas Corpus*, which so much affects the Sir William
Preservation and Security of this Lady. Meredith
(who himself
served the
first Writ up-
on the Earl,)
and drawing
a Pistol upon
him, and
challenging
him.

But at the same Time, His Lordship intimated to them, NOT
to EXECUTE it AT ALL, if it was possible to *obtain the End* of
their Application by any *gentler* or *other Means*; the End and In-
tention of granting it, being only to have the Lady immediately
brought up.

Mr. Just. DENISON (the only other Judge in Court) only said
“ that an Attachment *ought to go.*”

ORDERED That a Writ of Attachment issue against The Right
Honourable Laurence Earl FERRERS.

In Consequence whereof, The Earl having been served with the
Writ (or at least having had it notified to him) by the Under-She-
riff of *Leicestershire*, accompanied by a Brother of the Countess;—
On the *Saturday* following He appeared in *Westminster-Hall*; and
about one o'Clock, sent a Message into Court, to Lord Mansfield,
“ desiring to speak with him.”

LORD MANSFIELD bid the Messenger tell his Lordship, “ That
“ when an Affair was depending before the Court, He could not
“ speak with any Body about it, *but IN Court.*”

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* P. 634. *Soon after, the Earl came upon the Bench, and spoke to Lord *Mansfield*. It was not easy to understand what he said, as he spoke pretty low: But I imagine, he proposed putting some certain Questions to his Lady; For Lord *Mansfield's* Answer was, "That when She came into Court, All *proper* Questions would be asked her."

Some Time afterwards, on the same Day—

Lady *Ferrers* came into Court, and had Articles of the Peace ready to exhibit against the Earl.

Note—Nothing more was said concerning the *Habeas Corpus* or the *Return of it*; The real End of it being sufficiently answered, by her being left at Liberty to come to this Court, in order to obtain its Protection.

Sir *Richard Lloyd* and Mr. *Gould*, for the Earl, desired Leave to ask Lady *Ferrers* one or two Questions, previous to her swearing to the Articles which She had prayed Leave to exhibit.

But Lord *Mansfield* told her Ladyship, That She was *not obliged* to answer any Question previous to her swearing the Peace.

And He told Sir *Richard* that the present Business was only to obtain Security of the Peace.

Just at this Time, The Earl came into the Body of the Court, (upon the Floor, not upon the Bench;) and desired to ask Lady *Ferrers* "Whether an Affidavit which she had lately made, in the Country, before a Commissioner authorized by this Court to take Affidavits, was made by Her *voluntarily*, or *involuntarily*."

Note—This was an Affidavit (in which She had joined, during her being in his Power in the Country, after the issuing of the *Habeas Corpus*;) Wherein she was made to swear "That She was content to remain with her Husband; that She had no Complaint against him; and that the Application made by her Relations for the *Habeas Corpus* was without her Desire and against her Will." Which Affidavit *her Friends* said was so far from being voluntary, that it was *extorted* from her under *Duress*; and was the mere Effect of Fear Force and Compulsion, or at least of very *undue Influence*.

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*Lord MANSFIELD persevered in permitting her Ladyship, with- * P. 635.
out answering any Questions, to proceed in exhibiting her Articles;
And then asked the Earl, "if He had Security ready."

The Earl first, and Sir *Richard*, afterwards, pressed that Lady *Ferrers* might answer their Questions: And Sir *Richard* dropped an Intimation that the Earl's Regard or Disregard for her would depend upon her Answers.

But Lord *Mansfield* said He had before told Her, that She *need not* answer them: And now he would *not suffer* Her, He said, to answer them.

Lord *Ferrers* went in and out of Court once or twice; But did not, at *this* Time, give the Security of the Peace; Nor did Mr. *Norton* press that He should give it immediately.

On *Wednesday* the 27th of *April* following, The Earl appeared; and gave Security: Himself in 5000 *l.* And each Manucaptor in 2500 *l.*

Monday, 13th *February* 1758 The Earl having broken this Recognizance in the Month of *August* 1757, by drawing a Pistol upon Lady *Ferrers*, at the Earl of *Westmoreland's* at *Mereworth Castle* in *Kent*; He was taken up some Time after, upon a fresh Warrant from Lord *Mansfield*: And having given Bail on the same 13th Day of *February* 1758, before my Ld. Ch. Justice, (whilst his Lordship was gone out to Dinner,) He presently afterwards came into Court, to appear. And upon the Return of the Ld. Ch. Justice—

The Countess also came into Court; and *swore* FRESH *Articles* of the Peace against the said Earl, grounded upon the above-mentioned Fact. After which, He (being still present) was called upon to give Bail to these recent Articles of the Peace.

He had previously given Notice of Two Persons to be his Bail before the Lord Chief Justice: With One of which, the Prosecutors were not satisfied.

After several Proposals; and after several Hints which came from Lord *Mansfield*, as well as from Mr. *Norton*, "That it was necessary for the Earl to give Bail *at present*, and not to pray *Time* to do so, as the giving it *now* was the only Method he could take, if he expected to remain at Liberty;" It ended in a Compromise to take both these Persons as Bail now, and to give a few Days time for the justifying the doubtful One, (a Peruke-Maker,) or for finding a better.

Accordingly

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* P. 636. *Accordingly, He himself became bound in 5000 *l.* Mrs. *Shirley* (his Mother,) in 2500 *l.* and Mr. *John Bennifold*, Peruke-maker, in 2500 *l.*

The Earl's Counsel *now* moved to discharge the former Recognizance : To which the Lady's Counsel afterwards consented.

Tuesday, 13
June 1758.

Rex *vers.* Thomas Dawes.

ON *Thursday* last, the 8th of *June*, Mr. *Morton* and Mr. *Burrell*, on behalf of the Commissioners, shew'd Cause against making absolute a Rule of last Term, made upon the Commissioners in and for the County of *Sussex*, for putting in Execution the late
*30 G. 2. c. 8. * Act "for the speedy and effectual Recruiting His Majesty's Land-
" Forces and Marines," for them to shew Cause Why *Thomas Dawes* should not be discharged out of the Regiment of Foot commanded by Colonel *Thomas Brudenell*.

They produced a Number of Affidavits ; and rested entirely upon the Facts contained in them : Which fully proved (as they alledged) that He was a proper Object of the Act of Parliament ; and that the Commissioners had done Right ; and that He ought not therefore to be discharged from the Condition of a Soldier.

Mr. *Harvey* and Mr. *Norton*, on Behalf of the Defendant *Dawes* (the impressed Man,) on the contrary, argued for making the Rule absolute, " for discharging him."

They urged That this was a high and unconstitutional Authority lodged in these Commissioners, and without requiring from them any Oath of Duty : And they endeavoured to shew, from their Affidavits, that the Man was not a proper Object of the Commissioners Jurisdiction. They argued therefore that He ought to be discharged ; Especially, as the Crown did not at all interpose.

Note—The Regiment was gone abroad : But the Man himself had first *deserted* from it.

The Court did not come to any Determination, then ; but took Time, in Order to consider the Affidavits on both Sides.

Now,

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* Now, Lord MANSFIELD delivered the Opinion of the Court; * P. 637.
in which, He said, they were all agreed: And All of them, He
said, had separately read over the Affidavits.

Then he went minutely through the Affidavits on both Sides;
and made the proper Remarks upon the different Representations
of the Case.

The Result was, That they clearly thought him *to be* a proper
Object; and that the Commissioners had done Right.

Whereupon, they DISCHARGED THE RULE.
[See the Case next following this],

Rex *vers.* Andrew Kessel.

THIS Point was exactly similar to the last; being the Case of
a pressed Man, who applied to be discharged out of Captain
Temple's Company in Colonel *Duroure's* Regiment, upon the Foot
of Injustice done to him by the Commissioners, to whom He was
obliged by Force to submit: And the Question turned, in like
Manner, upon the Man's being a *proper Object* of the *Commissioners*
Jurisdiction, or not; which depended upon the particular Circum-
stances of the Case, sworn to, on both sides.

It was argued on the 10th of *June*, by Mr. *Norton* and Mr.
Bishop for *Kessel*, and by Mr. *Hussey* for the Commissioners, upon
the *Fact* only.

No Objection was made, on Behalf of his Majesty, or of Colonel
Duroure.

The Court had taken Time, (as in the former Case,) to look into
the Affidavits. And now

Lord MANSFIELD declared the Opinion of Himself and his Bre-
thren, " That upon the Circumstances appearing in *this* Case, The
" Man was *not* a proper Object of the Commissioners Jurisdiction;
" and that He was, by an undue Exercise of the Power trusted to
" them, compelled to serve as a Soldier."

And therefore They ordered That he should be forthwith dis-
charged. (But they would not give *Costs*; though asked for,
by the Man's Counsel.)

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* P. 638. * Note—In both these Cases (of *Dawes* and *Kessel*,) Neither of them could have brought a *Habeas Corpus*: Neither of them was in Custody. *Dawes* had deserted, and absconded: *Kessel* was made a Corporal. Both prayed to be discharged from the Condition of Soldiers, upon the Ground of the Commissioners having misbehaved in the Exercise of a Parliamentary Authority; (for which Misbehaviour, they might be liable to an Information.) In neither Case, did the Counsel object to the Propriety of this Method: And the Benefit to the Subject is manifest.

Rex *vers.* Davis.

*V. Rex v.
Roger Johnson,
2 Strange 824.
S. P.*

THE Defendant having been apprehended upon an Outlawry for High-Treason in diminishing the Coin of this Kingdom (*viz.* filing Guineas,) was brought up by *Habeas Corpus* from the Place where He was taken; and afterwards committed to *Newgate*: From whence he was brought up by Rule, on *Tuesday* 6th *June* 1758.

Mr. *Norton*, for the Crown, immediately prayed that he might be asked “what he had to say why Judgment should not pass upon him.”

And the Outlawry was then ordered to be read; And was accordingly begun to be read. But

The COURT not having had any previous Notice of this, nor having even seen the Outlawry, Adjourned it to the *Saturday* then next following (the 10th;) and Ordered that Copies of the Outlawry should be sent to them, in the mean Time.

The Defendant intimated “that he was out of the Realm at the Time of the Outlawry pronounced:” And he also intimated his Desire to have the Assistance of Counsel.

But *per* Lord MANSFIELD—The Court can *not assign* him Counsel, *till* he has pleaded: And *then* he may have Counsel, upon that *collateral* Matter. However, the Court do not restrain Counsel from advising him in *private*.

N. B. The Sheriff of *Middlesex* was ready with a Jury, in Case he had now pleaded “That he was NOT *the same Person*.”

On

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* On the said Saturday (10th June) the Defendant being brought * P. 639.
to the Bar, was called upon to hold up his Hand; and then arraigned
(by Mr. Athorpe Secondary of the Crown-Office,) upon an Outlawry
upon an Indictment in London, for High Treason in diminishing
the Coin of this Kingdom; and asked what he had to say for him-
self "Why this Court should not proceed to give Judgment and
"award Execution against him according to Law."

Note—The Sheriff of *Middlesex* was again ready with a Jury,
(as before) in case he had denied his being the identical Person.

Mr. Whitaker, who was Counsel for the Prisoner prayed that the
Outlawry might be read. Which being done—

Mr. Whitaker said, that If the Outlawry is bad, the Defendant,
or even any *Amicus Curiae*, may assign Errors upon it; And the
Court will either give him Time to apply for a Writ of Error, or
give him Leave to plead to the Indictment.

Now this Outlawry is bad, (He said) upon the Face of it.

1st Exception—The second *Capias* ought to have had 3 or 4
MONTHS between the Teste and Return: Whereas this has only
15 Days. 8 H. 6. c. 10. is express "that it shall be returnable
"3 Months after, where the Counties are holden from Month to
"Month; and 4 Months after, where the Counties are holden
"from 6 Weeks to 6 Weeks." 10 H. 6. c. 6. confirms the for-
mer Act; and extends it to Indictments removed by *Certiorari*.
And for Want of this, the Outlawry is void.

2d Exception. Here is a *Discontinuance* of Process for a whole
Year: There being a Chasm of a whole Year, in which it does
not appear that any Writs were issued out; (though the Sheriff's
Returns to such Writs are indeed set out.)

3d Exception (To the *Exigent*.) This *Exigent* is in London: And
the Outlawry is returned to be pronounced by Mr. King, the Coro-
ner. Whereas the Lord Mayor of London is perpetual Coroner in Lon-
don: And the Recorder is to pronounce it. *Cro. Jac.* 531. *Garrard*
v. Regem, proves that the Mayor for the Time being is perpetual
Coroner. 2 Ro. Abr. Title *Utlagarie*, Fo. 805, 806. prove both
Positions: *Pa.* 806. "That the Mayor is Coroner;" and *pa.* 805.
per quel, Pl. 1. "That the Judgment is given by the Recorder;
"and not by the Coroners."

2

4th Ex-

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* P. 640. * 4th Exception. He is not said to be outlawed, "*secundum Legem et Consuetudinem Regni*:" Which the Writ requires. And Dalton gives the Return in that Manner.

5th Exception. The *Name of Office* of the Sheriffs is not set to the Return of the second Exigent: 'Tis only "the Return of *W. A. and A. C. Esquires*. 2 *Hale's Hist. P. C.* 204. is express "that it must be so:" "The Sheriff's Name *and Office* also must "be subscribed to the Return of the Exigent; e. g. *A. B. Arm' Vicecomes*."

N. B. The Record appeared to be right. But Mr. *Whitaker* said it was not so in the Return upon the Writ itself.

6th Exception was to the *Writ of Proclamation*: Which he alleged to be faulty, both in it's *Teste* and in it's *Return*. This Writ is founded upon the Statute of 31 *Eliz. c. 3*. Which gives it in Personal Actions, and directs the particular Manner &c; And to be of the SAME *Teste* and Return with the Exigent. 4, 5 *W. M. c. 22. §. 4*. extends this Writ of Proclamation to *Criminal Cases*, as well as Civil; and directs it to be delivered to the Sheriff, 3 Months before the Return.

Now this Writ of Proclamation is *tested* and *returned* upon the SAME DAY. And the return of the Sheriff is only "That he "caused him to be proclaimed according to the Form of the "Statute." But *Non constat* What Statute he means: There is none mentioned in the Writ.

The Return ought to be particular; and to *specify* the respective Proclamations, and to shew that they were a Month before the *uinto exactus* by Virtue of the Exigent. And so Dalton says.

7th Exception. The Man was *abroad, out of the Kingdom*, at the time when the Outlawry was pronounced against Him.

This, indeed, is an Error in *Fact*; and must be verified.

8th Exception. The Hustings (where it was pronounced) are not said to be "holden *in and for* the City of London."

Mr. *Norton contra, pro Rege*, said He would be under the Direction of the Court, whether to defend it now, or take Time.

The COURT seemed to think that Mr. *Attorney General* should have been present.

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*But Mr. *Norton* said that Mr. *Attorney* had desired to be excused. * P. 641.

LORD MANSFIELD—Some of the Exceptions seem to have Weight: And some of the Errors alledged are Errors in Fact; And it is a Matter of Discretion in the *Attorney General*, “Whether he will think proper to confess *them*, or not.”

Mr. Just. FOSTER—Some of the Exceptions go to shew the Outlawry to be a Nullity, and to avoid it *without* a Writ of Error.

Which Lord MANSFIELD agreed to.

Mr. Just. DENISON—The Custom of the City of *London* is a Matter of Fact.

Lord MANSFIELD—Mr. *Attorney General* will consider Whether to confess the Errors in Fact, and let the Party in, to plead to the Indictment; or take the longer Course of a Writ of Error: This is a Matter of Prudence.

Mr. *Whitaker* prayed that the Prisoner might be sent to the Prison of *this Court*; and not to *Newgate*.

Per Cur’. *Newgate* is as much the Prison of *this Court*, as the King’s Bench Prison is: EVERY Prison in the Kingdom is the Prison of *this Court*.

The Prisoner was remanded; and Ordered to be brought up again on *Tuesday*, the 13th.

And Now, the Defendant being brought up accordingly, Mr. *Attorney General* allowed that One or Two of the Exceptions were fatal; As for Instance the 1st and the 6th.

But though the Act of 31 *Eliz. c. 3.* declares the Outlawry to be void, if had otherwise than that Act directs; Yet he said, He was afraid this Making it void could not be done by the Court upon Motion; but it must be avoided by Writ of Error, in the legal Way. For so is *Plowd. Com. 137. b.* and *Hob. 166.* and 2 *Hawk. P. C. 306. c. 27. § 127.*

Lord MANSFIELD—What do You say to the Errors in *Fact*?

Mr. *Attorney General*—If there are any that I *can* confess, I would do it: Because I am satisfied it *must be reversed* upon a Writ of Error. As to the 7th. If I was to confess it, it would not signify; Because his Time is elapsed: The Year is expired.

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* P. 642. *Cur.' There is no getting at it, without a Writ of Error.

LORD MANSFIELD—If the Attorney General has an Authority from the Crown, he may confess an Error in *Fact*, which is not true: But the *Court* will not permit the Confessing an Error in *Law*, which is not true.

Mr. Just. FOSTER mentioned a Case of one Mr. *Stafford*, who was called "Esquire;" And he said he was only a Yeoman, and not an Esquire: And the Attorney General came in and confessed

* *V. Lucas's* it. *
Reports 188.

† "Purchasing" his Writ of Error is a technical Term; which does *not* here convey any *pecuniary* Idea, as if he was to pay a *Price* for it.

The present Defendant was remanded in *Order* to † *purchase his Writ of Error*.

N. B. *Per Cur'* and Counsel—There are a great many *other Errors* upon this Record.

Wednesday,
14th June
1758.

Chesterton *versus* Middlehurst.

A *Bail-Bond* was given in a Court of a *County Palatine* (*Chester*), in an Action brought there: Which *Bail-Bond* being assigned by the Sheriff, an Action was brought upon it in *this Court*.

The Defendant filed Special Bail, below; and then moved to stay Proceedings here. And

The COURT All held this bringing the Action here, to be an *unfair Practice*; unless there had been some *Special Circumstance* to warrant it, (as the Defendant's Living out of the Jurisdiction, or the like:) Which was not even pretended, in the present Case. Therefore the Court held that the Plaintiff ought to have proceeded in the * *Court* below; and accordingly *set aside* his Proceedings in *this Court*.

* *V. Walton*,
Assignee, v.
Bent. Tr.
1766. 6 G.3.
B.R.

"An Action
"upon a Bail-
"Bond must
"be brought
"in the
"SAME Court
"where the
"Bail was
"given."

Rex *versus* Florence Hensley M. D.

ON Monday 8th of May 1758, The Defendant was brought into Court by the Keeper of *Newgate*, upon a *Habeas Corpus* directed to him, commanding Him "to bring up his Body." He appeared (upon the Reading of the Return) to have been committed

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* mitted by Warrant under the Hand and Seal of the Earl of *Holder-* * P. 643.
ness One of his Majesty's Principal Secretaries of State, for *High-Treason* in ADHERING TO, and aiding and corresponding with the King's Enemies; and to be detained in his Custody, by Virtue of a second Warrant of the like Kind.

Mr. *Attorney General* prayed that the Return might be filed.

Cur. Let it be filed.

Mr. *Attorney General* then informed the Court and the Defendant, "That there was an Indictment of High-Treason found " against the Defendant:" (Which Indictment was so found by the Grand Jury, by itself singly, and brought into Court, singly, by them on *Tuesday* last.) With which Indictment, the Defendant being now charged, And being called upon by the Secondary of the Crown-Office to hold up his Hand, The Court Ordered the Indictment to be read to him.

But The COURT, (*before* it was read to him,) asked him " Whether he desired Counsel to be assigned to him;" And if he did desire to have Counsel, then " *Whom*, by Name, " He desired to have assigned to him."

He named, And accordingly

The COURT assigned to him, Mr. *John* * *Morton*, and the * N.B. Mr. M.
Honourable Mr. *Thomas Howard*; and Mr. *John Peirce* for is not One of
his Attorney. His Majesty's
Counsel;
(though He
has a Patent
of Precedency.)

The Indictment was then READ *verbatim* to him, by the *express*
Direction of the Court: (Although He *had* a Copy of it five Days
ago; agreeable to 7 W. 3. c. 3, "for regulating of Trials in Cases
" of Treason and Misprision of Treason.") Upon which Indict-
ment being thus read to him by Mr. *Barlow*, He was immediately
asked (by Mr. *Atborpe*, Secondary of the Crown-Office,) " Whe-
" ther he was guilty or not guilty of the High-Treason therein
" charged upon him. To which he pleaded

NOT GUILTY.

The Defendant, after he had pleaded " Not guilty," intimated
to the Court " That he had received hard and severe Usage, during
" his Confinement."

Mr. *Attorney General* absolutely disavowed his having received
any severe Treatment at all; and assured him that he would be
treated with all possible Humanity, so far as was consistent with his
being safely secured from Escaping.

Then

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*P. 644. * Then a Day was fixed for his Trial ; viz. *Monday 12th June 1758.*

Which being settled, without any sort of Objection on any Part, the Defendant was

REMANDED (to *Newgate.*)

On which *Monday 12th June 1758*, at the Trial, The Defendant's Counsel took Exception to the Reading of two Papers—(N^o. 1, 2.) being the rough Draughts of Letters written by himself, and found in a Bureau where he kept his Linen and Papers; and which were only *introductory* Evidence; not any Part of the *Overt-Acts*, which were to support the Species of the Treason charged upon him. It was objected to them, that they were not sufficiently proved to be *found in his Custody*; nor sufficiently proved to be his *Hand-Writing*: For *mere Comparison of Hands* is not sufficient to support their being read against the Defendant.

The Counsel for the Crown answered, That, the Papers being *found in his Custody*, and his Hand having been *sufficiently proved by Persons who had seen him write*, it was sufficient to intitle the Crown to read them; though the Jury are to judge of them. And they mentioned *Laver's Case*; and *Lord Preston's Case*; and *Francis's Case*; and *Sidney's Case*; and *Buchanan's Case* in the North, in 1746; and *Crosby's Case*, *Skinner* 578, 579. and 1 *Ld. Raym.* 39. S. C. *Rex v. Crosby alias Philips*: Where Comparison of Hands was allowed to be good Evidence, if the Papers are found in the Custody of the Person himself. Sir *John Wedderburn's Case*. Sir *Cholmeley Dering's Case*—for Murder; (*i. e. Rex v. Thornhill.*)

The COURT unanimously over-ruled the Objection. These Papers were *found in his Custody*; and they have been sufficiently proved by Persons who have *seen him write*, to intitle the Crown to read them.

Then the Evidence for the Crown being opened, and given; (which consisted chiefly of Letters to and from the Prisoner;) and being alledged to be a Proof of Overt-Acts of *two* different Sorts of Treason, viz. *Of compassing and imagining* the Death of the King, and also of *adhering* to the King's Enemies;

Mr. Solicitor General declined Summing up the Evidence; choosing to reserve himself for the Reply.

Which the COURT held to be within Rule, if He so thought proper.

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*So the Counsel for the Crown rested it here.

* P. 645.

Then the Counsel for the Prisoner (Mr. *Morton* and Mr. *Howard*) began upon his Defence. They declined giving any *Evidence* on the Part of their Client : But they insisted upon these two Topics, in his Defence ; viz.

1st. That *no* One act was proved upon him in *Middlesex* ; where the Indictment is laid.

2dly. That the Evidence, if it had been brought Home to the Defendant so as to affect him, yet would by no means have *amounted to a Proof* of any Overt-Acts of *either* of the two before named Species of Treason.

For they were only Letters of *Correspondence*. And if a Correspondence of this Nature, either within or out of the Realm, had been Treason in *general* and in *all* the King's Subjects, within 25 *Edw.* 3. it would never have been *particularly enacted to be Capital* in a SOLDIER, by the Mutiny Acts of 3, 4 *Ann. c.* 16. §. 35. Fo. 266. and 30 *G. 2. c.* 6. §. 1.

N. B. The former makes it Treason, to do it either “ upon
“ Land, *out of England*, or at Sea :” The latter makes it Capital, or such other Punishment as a Court Martial shall inflict, to do it “ upon Land *within* OR *out of Great Britain*,
“ or upon the Sea.”

Mr. YORKE, His Majesty's Solicitor General, then proceeded to reply : In doing which, He made only some General Observations upon the Evidence that had been given on the Part of the Crown, but did not sum it up particularly, (as the *Prisoner* had given *no Evidence* at all ;) but confined himself to what the Defendant's Counsel had urged in his Favour, in Point of *Law and Reason*.

He answered thus, to the Objections which they had insisted upon.

1st. That the 5th Letter given in Evidence bears Date “ from
“ *Twickenham*”, which is in *Middlesex*. Which, alone, is a full Answer to the Objection.

2dly. That the Correspondence proved *was*, in Point of Law, an *Evidence of an Overt-Act*, of EACH of the before mentioned Species of Treason.

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* P. 646. *First—Of *Compassing and imagining* the Death of the King. To prove which, he cited 1 *H. H. P. C.* 167. Cardinal *Pool's* Case 3 *Inst.* 14. S. C. And so *Ld. Ch. J. Holt* also held, in *Gregg's* Case; (which He cited from a Manuscript Report of Judge *Tracy's*;) And Baron *Smyth* and Mr. Just. *Dormer* seemed to agree to it. And in *Ld. Preston's* Case, also, *Ld. Ch. J. Holt* so held.

Secondly—It is also an Overt-Act of *adhering* to the King's Enemies. In *Gregg's* Case—, It was agreed by all the Judges, “That such Letters, *though intercepted* before they arrived, “were so.”

LORD MANSFIELD—We have seen three Reports of *Gregg's* Case; viz. One, by *Ld. Ch. Baron Dodd*; another, by Mr. Just. *Price*; and this, by Mr. Just. *Tracy*: And they all three agree “That such Letters, *though intercepted*, were Overt-Acts “of *each* Species of Treason before mentioned; And that *All* “the Judges *agreed* in this.”

Mr. Solicitor General—And as to the Statutes of Queen *Ann* and the present King, The Statutes of 7 *Ann. c. 4.* and the late Mutiny Act of 30 *G. 2. c. 6.* go further than the Act of 25 *Ed. 3.* does.

LORD MANSFIELD summed up the Evidence.

As to the LAW—*Levying War* is an Overt-Act of *Compassing* the Death of the King: An Overt-Act of the *Intention* of levying War, or of bringing War upon the Kingdom, is settled to be an Overt-Act of *Compassing* the King's Death. *Soliciting a foreign Prince, even in Amity* with this Crown, to *invade* the Realm, is such an Overt-Act: And so was Cardinal *Pool's* Case. And One of these Letters is such a Solicitation of a foreign Prince, to invade the Realm.

Letters of Advice and Correspondence, and Intelligence to the Enemy, to enable them to annoy us or defend themselves, written and sent, in order *to be delivered* to the Enemy, are, *though intercepted*, Overt-Acts of *both* these Species of Treason that have been mentioned. And this was determined by all the Judges of *England*, in *Gregg's* Case: Where the Indictment (which I have seen) is much like the present Indictment. The only Doubt, there, arose from the Letters of Intelligence being *intercepted* and *never delivered*: But They held “that *that* Circumstance did *not* alter the “Case.”

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*As to the FACT, in the present Case—The Jury are to con- * P. 647.
sider whether they were written by the Prisoner at the Bar, *in Or-*
der to be delivered to the Enemy, and *with Intent* to convey to the
Enemy such Intelligence as might serve and assist them in car-
rying on War against this Crown, or in avoiding the Destinations
of our Enterprizes and Armaments against them.

Then His Lordship went through the Evidence particularly :
And having finished his Summing it up, He proposed to the Coun-
sel, and they agreed to it on both Sides, “ That the Jury should
“ take the Letters out with them.”

As to the *Locality* of the Facts—He said, It is certain that *some*
One Overt-Act must be proved *in the County* where the Indictment
is laid : Indeed if *any One* be so proved in *that County*, it will let
in the Proof of others in *other Counties*.

Now here, *One* of the Letters is *dated at Twickenham*, which is
in *Middlesex*.

The Jury went out, a little after eight, taking the Letters &c
with them ; And soon sent to desire Leave to have Candles ;
which the Officer who brought in their Message, said he was
sworn “ not to let them have ;” unless it should be so *Ordered*.

Lord MANSFIELD asked the Counsel, if either Side objected
to it.

And the Counsel on both Sides agreeing to it—

Leave was given accordingly : And they had them.

In half an Hour, the Jury returned, and brought in their Ver-
dict, “ GUILTY.”

Lord MANSFIELD observed, as to the two Acts of Parliament of
7 Ann. c. 4. and 30 G. 2. c. 6.—That they carried the Matter *fur-*
ther than the Law extended to before : And, besides that, they were
Both of them *declaratory*, as well as enacting ; which was calculated
on purpose to avoid the very Objection that has been now taken :
(*V. ante*, 645.)

The Defendant was remanded to *Newgate* ; and a Rule made
“ to bring him up again on *Wednesday*.”

And

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* P. 648. * And the Prisoner being accordingly brought to the Bar, on this Day about 4 o'Clock in the Afternoon, by the Keeper of Newgate,—

Mr. Attorney General prayed the Judgment of the Court upon him.

Mr. *Athorpe*, Secondary of the Crown Office, called upon Him to hold up his Hand; and reminded him, “ That he had been indicted “ of High Treason, and thereto had pleaded *Not guilty*; and for his “ Trial had put himself upon God and the Country, which Country “ had found him Guilty;” and then asked him “ If he had any “ Thing to say for himself, why the Court should not proceed to “ give Judgment against him according to Law.”

The Prisoner thereupon took out a written Paper; and rather read, than spoke it. It consisted partly of an *Apology*, and partly of a Sort of *Defence* against the Charge; together with some Objections to the *Proof* of it upon him.

The Substance of it was—That the Correspondence with which He had been charged, as treasonable and giving Intelligence to an *Enemy* of his Liege Sovereign, was nothing more than writing Letters to his *own Brother*, who was so far from being an Enemy, that he was in the Service of the King's *good Brother and faithful Ally*, as His Majesty Himself had stiled the King of *Spain*, in His Speech to his Parliament; and that these Letters contained *only Coffee-house News and idle Speculations*; but gave no such Intelligence as could be *useful* or even unknown to an Enemy; nor did betray any of the *secrets* of this Government to their Enemies.

That he had no Malignity in his Heart, against the King or His Government; nor had ever been guilty of any improper Behaviour; But always conducted himself with Decency and Duty towards his King and Country: For the Truth of which, he appealed to his Character and Conversation.

And as to the *Papers* which were seized by the Messenger, at the House where he lodged—They might just as well be the *Woman's* of the House, as *his*: For *Both* of them had *Access* to the Bureau, in which the Messenger found them.

That the Statute of 7 *W.* 3. c. 3. § 2 & 4. directs that there shall be *two* Witnesses to each Overt-Act of the same Treason. Whereas his *Hand-writing* had been proved only by *One* Witness, who could pretend to *know* any Thing of his Hand-writing: For that the other
three

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* *three* knew little or nothing of his Hand, and could *scarcely* be said * P. 649.
even to have ever seen him write.

[Note. The Act directs “That *either* both the Witnesses must
“ be to the same Overt-Act, or One of them to One, and
“ the Other of them to another Overt-Act of the same
“ Treason.”]

And there was no Witness at all, he said, to prove any Act of Treason committed by him *in the County of Middlesex*, where the Indictment lays the Offence to have been done.

He alledged, that this Case of his was the *first Instance*, since the Statute of *Edw. 3.* where *Giving Intelligence* has been holden to be *High-Treason*. And he said, that as he had not had four Days between his Trial and his Sentence, (as was usual,) his Counsel had not had sufficient Time to prepare themselves in Arrest of Judgment.

Therefore upon the whole, he prayed that the Court would either be so kind to him as to *respite* his Sentence; or, if that might not be obtained, that they would be graciously pleased to recommend him to *His Majesty's Mercy*.

He was then asked “if he had any *Point of Law* to move in *Arrest of Judgment*.”

To which His Answer was, “That he had not.”

Lord MANSFIELD then observed, that the Prisoner had been convicted upon a very full Trial, and upon very cogent Proof; and that he appeared upon the Evidence to have committed *many* Overt-Acts of Treason.

He took Notice, that the Prisoner had even *solicited* this Employment, *from Inclination*; as well as under-taken for *Hire*, to act as a Spy against his own native Country, and to reveal the Secrets of the King and Government to the open Enemies of Both; and to give them Information and Intelligence of the Enterprises and Designs of this Kingdom against them; and all this, with Intent and in Order to aid and assist them in defending themselves against his King and Country.

He observed that the Enemy had manifestly shewn “that *they themselves looked upon* this Correspondence to be an Aid and Assistance to them;” by their giving him a Stipend, and paying him a stipulated Monthly Price, as the Purchase and Reward of it, under a Penalty of his forfeiting 20 s. for every Omission of a Weekly Letter from him.

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* P. 650. * He also observed, that the Prisoner appeared to have procured his Information of the State of our Navy and Army and Finances, and the other Matters contained in his Papers and Memorandums seized in his Bureau, with that very *VIEW and Intention* of communicating them to the Enemy: And by his Letter of the 22d of *July* last, he had even *advised and invited the Enemy* TO INVADE *his Native Country*; and to *bring War and Destruction into the Heart of it*. The Guilt of this Offence arises from the *Nature* of the Correspondence, which is calculated to betray the *Secrets* of his King and Country to the Enemy, *as a SPY*; a Treason of a very dangerous kind, and which gives an Enemy much more Aid and Assistance, than a Person publicly and professedly declaring himself an *open Enemy* to his own Country could give them.

He laid it down as a Point which was never doubted, “ That
“ this Offence, of SENDING INTELLIGENCE to the Enemy, of the
“ Destinations and Designs of this Kingdom and Government, in
“ Order to assist them in their Operations against Us or in their
“ Defence of themselves, is High-Treason; *even* ALTHOUGH such
“ a Correspondence should be *intercepted*, without ever coming to
“ the Enemy’s Hands. And so was the Resolution of All the
“ Judges, in *Gregg’s Case*.”

And as to the Witnesses to the Prisoner’s *Hand-Writing*—There are *Four* of them that have *seen* him write, and swear to his Hand, of their *own Knowledge*: And these four Witnesses are *not contradicted* by any Evidence on his Part; but, on the contrary, are *confirmed* by a Variety of Circumstances.

As to the Point of *Locality*—He said that if there had been *no* Evidence at all, of that particular Letter which bears Date at *Twickenham* (which is in *Middlesex*,) Yet nevertheless the *Presumption* was strong and stood uncontradicted too, “ That they were *written*
“ in *Middlesex*, where the Prisoner resided, and where his Papers
“ were seized.”

As to *Mercy*—He told the Prisoner, that *that* was in the KING’s Breast; but was no Part of *their* Province: And therefore his Application on *that* Head, must be *elsewhere*.

The Lord CHIEF Justice (it being a Case of *High-Treason*) pronounced the Sentence.

Mr. Attorney General then moved, that the Court would appoint a *Day* for the *Execution*.

Lord MANSFIELD desired him to name a Day.

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*Mr. *Peirce*, the Defendant's Solicitor, said he hoped it would * P. 651.
not be an early Day.

Mr. *Attorney General* said, He was willing to give as long a Day
as might be proper.

Mr. Just. FOSTER mentioned, that Dr. *Cameron* had 3 Weeks.

[N. B. Mr. *Charles Radcliffe* had only a Fortnight.]

Mr. *Peirce* desired that this might be a *Month*.

The COURT and Mr. *Attorney General* very readily agreed
to a *Month*. Accordingly, it was Ordered to be upon *Wednesday*
the 12th of *July*.

The Prisoner was remanded to *Newgate*; and bowed respect-
fully to the Court, and courteously to the Bar and Audience,
on retiring.—

Note.

On the *last* Day of a Term

An *Attachment* may be moved for, in the two Cases following,
viz.

For * Non-payment of *Costs*; and
Against a Sheriff, for *not returning* a Writ.

This was alledged by Mr. *Clayton*, and conceded by the Court,
to be the Practice.

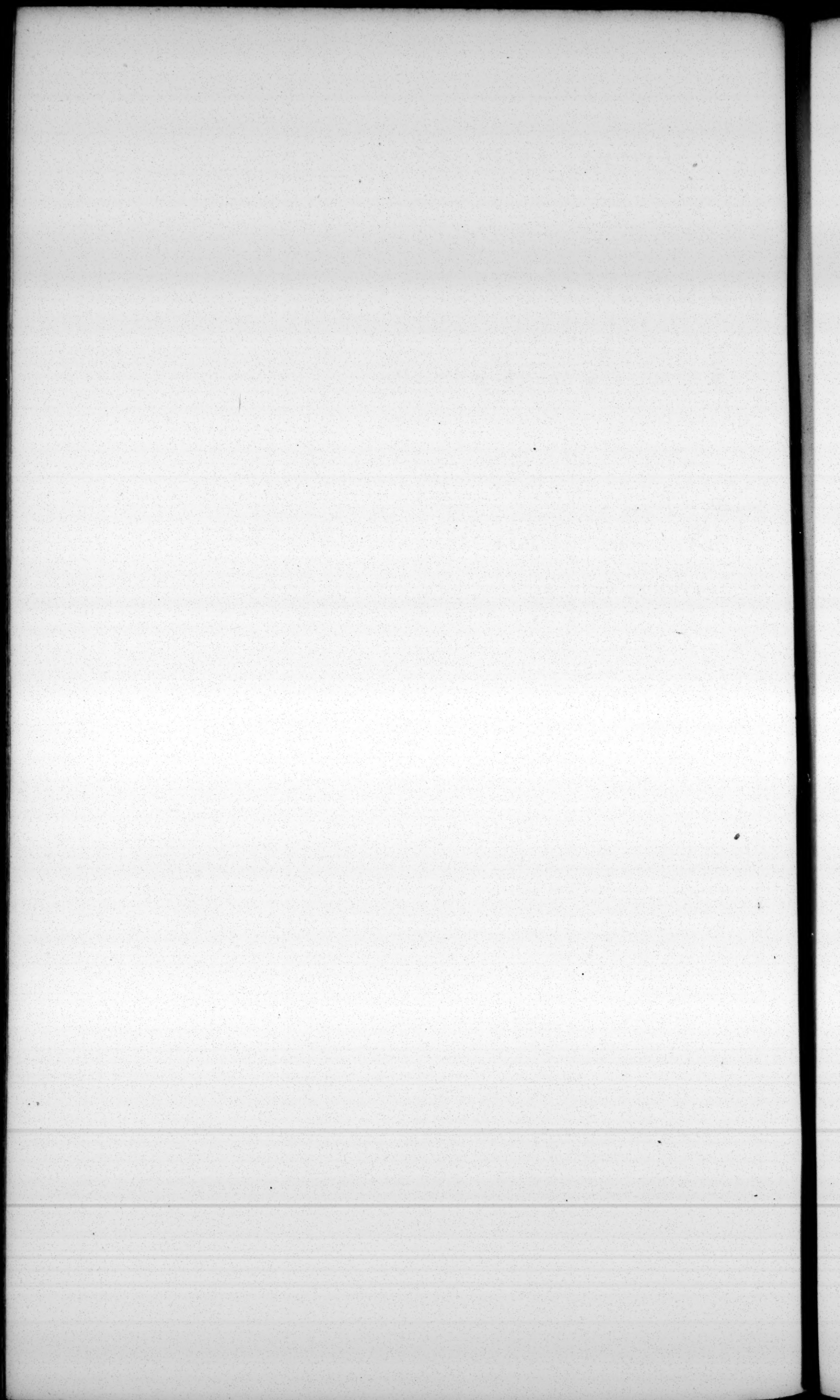
Note also

The Rule is, That Counsel may move, on the last Day of Term,
To *quash* an INDICTMENT; but
Not to *quash* an Order.

* This former Case was confirmed by the Court, expressly and particularly, on a Motion of Mr. *Widmore's* the last day of *Michaelmas* Term 1770.

The Court was not up, till near Midnight.

The End of *Trinity* Term 1758. 31 Geo. 2.



A

T A B L E

O F

The Principal Matters

Contained in this VOLUME.

Account stated. See *Debt, Extinguishment, Pleading.*

I S *no Extinguishment* of the Original Debt. Page 9.

Action.

Of Trover. See Title *Trover.*

Of Trespafs. See *Trespafs.*

Of Ejectment. See *Ejectment.*

Of Debt *upon an Award itself* differs much from an Action of Debt *upon the Arbitration-Bond.* 280 to 282. See *Arbitration.*

On the *Case*, on 12 G. 1. c. 29. §.1, 2. Page 332. See *Declaration on Bail-Bond.*

On *Indebitatus Assumpsit.* 375. See *Declaration.*

On a *Note.* 375. See *Declaration.*

On a *Bail-Bond* given in a *County Palatine*, on an Action brought *there*, must be brought in that Court below, and *not here*, unless there be *special Circumstances* to warrant it: Proceedings were therefore stayed, in the Action here. 642.

By Husband and Wife (*Parish-Poor*,) against a *Justice of Peace*, for committing the WIFE (as well as the Husband) to the House of Correction, for *returning to the Parish* from whence they had

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been legally removed, without bringing a Certificate. Page 596 to 603. See *Parish-Poor*.

Ad quod damnum

Is the only legal Authority for *altering* a Road. 465.
Inclosing a Road. Ibid.
Repairing the new Road. Ibid. See *Highway*.

Alienation of Land

Could not be made, according to the *ancient feudal Law*, without the *Lord's Concurrence*: And the *Form of Conveyance* was by *Feoffment*, publicly, notoriously and solemnly made. 107.
The Statute of *Quia Emptores Terrarum* (18. E. 1.) took away *Sub-Infeudations*; and gave *free Liberty* of Alienation to the Tenants of *Subjects*, and to those who held of the King *as of an Honour or Manor*: And other Statutes extended the Power of Alienation, to the *King's Tenants in Capite*. 108.

Ambassadour's Domestic Servant

Must be *Bonâ Fide*, so, in order to be privileged under 7. Ann. c. 12. Whereas this was a *Land-waiter* at the Custom-house. 401.

Amendment

Shall *not* be made, *after* the Court can not help seeing that the Matter is *upon Record*; (as giving Leave "to withdraw a Demurrer and plead to Issue," *after other Issues* joined in the same Cause have been actually tried, and Verdicts found, with contingent Damages:) For the Whole must be *supposed* to be still in *Paper*. 322.

Amotion. See *Disfranchisement*.

Apprentice. See *Trade*.

Apprenticeship

Where not previously necessary to an *unacting* Partnership in Trade. Page 5 to 10. See *Trade and Trader*.
Exercising a Trade *without having served One*. See *Statutes*, 5. Eliz. c. 4. §. 31. and *Indictment*.

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Arbitration, Arbitrators

Awards are *now* considered with *greater Latitude* and *less Strictness* than formerly: And 'tis right that they should be *construed liberally and favourably*, and *not* scanned with critical Nicety. Page 277. 278.

Yet they must be *certain* and *final*; that is, certain to a *common Intent*, and consistent with *probable Presumption*, and *sufficiently*, in effect, *mutual and final*. Ibid.

In an Action of Debt brought *upon* the *Award itself*, the Plaintiff needs shew forth *Nothing MORE* than is *necessary to support* his Claim and intitle him to the Thing demanded: *All else* must come on the *Defendant's* Part. But it is quite otherwise, if the Plaintiff brings his Action of Debt *upon* the Arbitration-BOND: In *that* Case, He must set forth the *whole* Award. 280. 281. 282.

Affise of NOVEL DISSEISIN

Was *introduced* (probably from the Usage of Normandy,) in or before the Reign of *Hen. 2.* and was considered as a *Benefit* and *Indulgence*. 107.

Both the Legislature and the Courts of Law *extended* this Remedy, for the sake of the true Owner, to *every* Trespass or Injury done to his Real Property; if, by bringing his Affise, He thought fit to *admit* himself disseised. 110.

The Reports of Affise can only relate to Cases where the true Owner *admits* himself to be disseised. Ibid.

Against whom this Remedy lay. Ibid.

Assurance. See *Insurance, Policy*.

Attachment

Granted against the Plaintiff's Attorney, for *putting the Name* of an Attorney of this Court to the Process, *without* his Authority. 20
What *Sort* of Attachment may be moved for, on the last Day of a Term. 651. See *Practice*.

Attaint

The Writ of Attaint is *now* a *mere Sound*, in every Case: And, in *many*, it does not pretend to be a Remedy. 393. See *New Trial, Practice*.

Attorney

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Attorney.

An Attorney's *Name* put to Process, without his Authority. 20 See Attachment.

An Attorney of this Court having, by *mere Collusion* and with Intent to secure the Business arising from the Prisoners, taken one of the *Turnkeys* of the King's Bench Prison for his *Article-Clerk*, the Articles were *cancelled* in Court, by Order of the Court, and ordered to be kept there. Page 291.

Award. See *Arbitration*.

Bail

FOR a *Bankrupt* who obtains his *Certificate* pending the Action, shall be discharged, if the Certificate is obtained *before* they are *fixed*: But if not till *after* the Bail are fixed, then they remain liable. 244. 245.

Affidavit of the Debt being upwards of 10*l.* (in a Superior Court) and the Sum sworn to to be *marked* on the Back of the Writ or Process. See *Statute* 12. G. 1. c. 29. §. 1. 2. and *Declaration on Bail-Bond*

For a *Soldier*—How they may *surrender* him, in their own Discharge. 339. 340. See *Soldier, Habeas Corpus*.

Shall have *Time to surrender* their Principal, *after a Writ of Error* brought by him; but *upon different Terms*, according to the different Circumstances. 340.

1. If the Bail apply *within Time* allowed for surrendering the Principal, the Terms are "That they pay the Money, OR "surrender the Principal, *within 4 Days after* the Writ of "Error shall be affirmed." *Ibid.*
2. But if they do *not* apply *within* that Time, then they shall have only the 4 Days to pay the Money; but *no* Alternative of surrendering the Principal. *Ibid.*
3. 'Tis the *Allowance* of the Writ of Error, that is the *proper Supersedeas*: The *Notice* of it's being allowed, is only to bring the other Party into Contempt, in Case He should *proceed subsequently* to such Notice. *Ibid.*

An *Exoneretur* was ordered to be entered (upon the Bail's *surrendering* the Principal;) But, by the Omission of the Officer, was *not actually* entered. The *Plaintiff* knew of the Surrender: His Attorney did not; but *sued Scire facias* against the Bail, into London,

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London, where the *Original Cause of Action* was: These Scire faciases were holden i rregular:

1st. Because the *Plaintiff* Himself was *apprized of the Surrender*. 409.

2dly. Because they were not sued into *Middlesex*, where the *Bail-piece* remained, after the Surrender. *Ibid*.

Bank-Notes.

A Bank Note payable to W.^m Finney or Bearer, on Demand, was sent into the Country by the General Post. The Mail was *robbed*, and this Note taken out. This Note (for £21: 10: 0. only) being so *stolen*, was paid to an Inn-keeper, for a *full and valuable Consideration*, and in the *usual Course and Way of his Business*, and *without any Notice or Knowledge* of this Robbery or of it's being taken out of the Mail. Payment was stopt at the Bank. The Note was brought thither, for Payment. The Cashier refused to pay it, or to *redeliver* it. *Trover* was brought by the Inn-keeper: who had Judgment against the *Cashier*. 453. to 460.

1st. Bank-Notes are treated, and are to be considered as *Money*, or *Cash*; not as Securities or Documents for Debts. 457. 459.

2dly. They pass by *Devise*, as *ready Money* or *Cash*. *Ibid*.

3dly. Neither *They*, nor *Money*, can be pursued and recovered, after they have *fairly and bonâ fide passed in Currency*; even though *stolen*. 458.

4thly. But *before* *They* or the *Money* have passed in *Currency*, an *Action* will lie, for *Either*. *Ibid*. And so it will, against the *Finder* of *Money* or of *Bank-Notes*; *before* *Payment* away in *Currency*. *Ibid*.

5thly. Bank-Notes are *not* like *Lottery Tickets*: Which are *identical* and *specific*, and whereof *mere Delivery* may make *no Change of Property*. 459.

6thly. It is necessary, for the Purposes of Commerce, that their *Payment* should be *established* and *secured*. *Ibid*.

7thly. But it may be reasonable to *stay Payment*, till Inquiry whether the Bearer came *fairly* by it, and for a *good and valuable Consideration*. *Ibid*.

Bankrupt.

The *Property* of a Bankrupt's Goods is, AFTER *Assignment*, in the Assignee, from the *Time* of the Act of Bankruptcy, by *Relation*. 31. 32. v. *infra*. 440. & 817 to 820.

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And the Assignee may maintain *Trover* against the Sheriff who took them in Execution after the Act of Bankruptcy, and before the Assignment, but SELLS them AFTER the Assignment: For the SELLING was certainly unlawful, whatever the Taking might be. Page 31. 32. 33. And See Title "*Trover*."

Bail for a Bankrupt, who obtains his *Certificate* pending the Action, shall be discharged, if the Certificate is prior to their being FIXED: Otherwise they remain liable. 244. 245.

But the *Bankrupt Himself*, though discharged of the *Original Debt*, is yet LIABLE to the Judgment in an Action against Him upon the *Bail Bond*: For this is a new and distinct Cause of Action. 436.

By 21. J. 1. c. 19. §. 2. A Trader who, being arrested for Debt, shall after such Arrest lie in Prison for two Months, upon that or any other Arrest or Detention in Prison for Debt; Or, being arrested for 100*l.* or more, shall escape out of Prison; [or procure his Enlargement by putting in common or hired Bail, repealed by 10. Ann. c. 15. §. 1.] shall be accounted a Bankrupt, to all Intents and Purposes: And in the said Cases of Arrest or Lying in Prison for such Debt or Debts, [or getting forth by common or hired Bail,] from the TIME of his or her said FIRST Arrest.

1st. All the *Bankruptcy-Acts* must be construed according to their real Intention, and so as to answer the Ends of public Benefit. 439. 440.

2d. ESCAPE means a Running-away contrary to the Sheriff's Consent; not where, by Permission of the Sheriff, He is carried through another County, and calls upon his Attorney in that other County, on his Road to a Judge's Chamber upon a Habeas Corpus: This shall not make him a Bankrupt and a Criminal. *Ibid.*

3d. Where SUFFICIENT *Bail* is fairly put in, and the Defendant afterwards at a future Day surrendered, the Bankruptcy shall not relate to the Time of the first Arrest; but only to the Time of the Surrender. *Ibid.* For the Bankruptcy * commences only from ACTUAL Lying in Prison. *Ibid.* * v. *supra*. 31. *infra*, 817 to 820.

4th. But when Bail is put in, merely with Intent to surrender immediately; and they do so, *eo instante*, and the Defendant is instantly committed Custod. Mar.; This is only Form, and (in Effect) no Bail at all, but a Continuation of the same Imprisonment: And therefore the Bankruptcy shall here relate to the FIRST Arrest. *Ibid.*

A Conveyance made by a Trader, of his WHOLE Substance, to a particular Creditor, was, under all the Circumstances of it, adjudged to be fraudulent and an Act of Bankruptcy; although it was made by way of Security, and for a valuable Consideration, and executed.

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executed (but without Delivery of Possession) *three Weeks before* any other Act of Bankruptcy. The principal Circumstances were, That the Trader *continued in Possession*, and visibly *acted as Owner*; That the Rest of the Trader's Creditors were imposed upon by *false Appearances*; That the Agents of this particular Creditor told the Rest of the Creditors, "That the Trader had mortgaged his Leaseholds," but *concealed* his having assigned any thing else; That both the particular Creditor and his Agents appeared clearly to be *aware* "that *Possession was necessary*;" but had *contrived* and originally intended "That there should be a "Delivery of Possession, as soon as the Trader should determine "to become Bankrupt; but not sooner;" in order to *evade* the Clause in 21. 7. 1. c. 19. §. 2. In *other* respects, this Conveyance was fair and honest; being intended to secure one De Mattos, in London, from being a sufferer by the Country Trader's *Overdrawing* upon him; De Mattos having agreed to permit Slader, the Country Trader, to draw upon him in London, and to *advance* as far as 300 l. for Slader. Resolved

1st. That this Conveyance was *fraudulent*, and an *Act* of Bankruptcy within the 1 7. 1. c. 15. §. 2. Page 467 to 485. v. *infra* 829 to 833.

2d. All the Bankrupt-Acts are to be taken *together*, as One System of Law: And they are to be construed *favourably for Creditors*, and to *suppress Fraud*. 474.

3d. *Indemnity* was a good and *valuable Consideration*: And this Deed was a *fair Transaction*, as between the *Parties*. 474. v. *infra* 830.

4th. But, many Transactions, fair as between the *Parties*, may yet be *fraudulent* as to *third Persons*, by reason of Deceit upon or Injury to *them*. 474. v. *infra* 830.

5th. This was one of those Cases: The Creditors were deceived by *false Appearances* connected with a *secret Confidence*. 475. The *End* and the *Means* were Both unlawful. *Ibid*.

6th. The *End* was unlawful. For

1st. The *Preference* aimed at, was fraudulent and unlawful. *Ibid*.

2dly. *Preference* of a favourite Creditor, by an Assignment of *All*, after making and just before executing a Determination to break, even if accompanied with a formal *Delivery of Possession*, is a Fraud upon the whole Bankrupt-Law; and would defeat the two main Objects of it, viz. the *Management* of the Bankrupt's *Estate*, and an *equal Distribution* of it amongst *all his Creditors* who have trusted to his *general Credit*. 476.

3dly. In like manner, a Conveyance *calculated to postpone* a particular Creditor is an Act of Bankruptcy. 477.

4thly. *Priority* shall not be gained by *secret Liens*. *Ibid*.

5thly.

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- 5thly. Therefore Conveyances of *personal* Chattles, by way of Security, where POSSESSION is left with the Bankrupt, shall not give any Priority. Page 477.
- 6thly. But Conveyances of *Land*, are different: For Land is holden, without Perception of Profits, by the TITLE, *Ibid.* and 484.
- 7thly. There is also a great Difference between Conveyances of All, and of a Part only. The Latter may be *public fair and honest*: But the former must either be *fraudulently kept secret*, or produce an immediate Bankruptcy. 478. v. *infra* 830.
- 7th. The Means likewise were unlawful, as well as the End; namely, the *false Credit* given to the Bankrupt, by leaving him in Possession, and acting as Owner; and the *secret Trust* “to deliver the Possession, so as to avoid the Clause in 21. J. 1. c. 19.” 482. 483.
- 8th. No Deed, made by a Trader, can be fraudulent in a Court of Equity, which is not *fraudulent at Law* and an *Act of Bankruptcy*. 479. 481.
- 9th. Every *equivocal* Fact may be explained by Circumstances: None, more than *Deeds*; for hardly any Deed is fraudulent, upon the mere Face of it. 484.

Baron and Feme.

A Husband and Wife are considered as one, in matters of Evidence; and cannot be *Witnesses* the one for the other. The Husband can not be *Witness* for his Wife, in a Question concerning her *separate Estate*. 424.

The WILL of a *Feme Covert* made under an Agreement with her Husband previous to Marriage, giving her *Power to make a Will*, must be PROVED in the Spiritual Court; though it operates as an Appointment. And *Legacies* appointed under it, shall *lapse*. So it has been settled in Chancery. But the Spiritual Court can not treat it as a Will, by granting *strict Probate* of it. 432. However, they may grant *Administration*, with such Appointment annexed: Which proves it to be *testamentary*. *Ibid.* And such an Appointment is in the Nature of a Will; and attended with all the Consequences of a Will. *Ibid.*

1st. The Fact, “that the Paper was actually her Will,” must be established by the *Ecclesiastical* Court. *Ibid.*

2dly. But if the Question turns upon her *Power* to make it, That Question must be discussed in the *Common Law* Court: And if she had no such Power, then a Prohibition shall go. 433.

SEPARATED, by *Articles* of Agreement made in Consideration of Money received by the Husband, and with Covenant “never to disturb

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“disturb his Wife, or any Person with whom She should
“live.”

1st. The Husband cannot *seize* her, or *force her to live with him*.

542.

2d. Such an *Attempt* would be a *Breach of the Peace*. Ibid.

3d. And a *Contempt of the Court*, if molested in her *Return from thence*, being brought up by a *Habeas Corpus*. Ibid.

Bishops

May grant ANCIENT OFFICES, with the *ancient Fees*, in the same manner as they have been USUALLY granted *before* the Act of 1. *Eliz. c. 19*. For an Office and Fee which *existed before* that Statute, is *not within* the restraining Clause of it, either in Word or Intent; But may be granted *since* the Statute, precisely in the *same manner* as it was granted *before*: And *such Grants* are *no Dilapidation of the Revenue*, nor bring any *new Charge* upon the *Bishoprick*. 221 to 226.

The *Utility or Necessity* of such an Office is no more material *since* that Statute, than it was *before* it: It is totally *immaterial*. Ibid.
For the Question turns solely upon the *Usage*. Ibid.

At *Common Law*, a Bishop, *with the Confirmation* of his Dean and Chapter, might exercise *every Act of absolute Ownership* over the Revenues of his See; and *bind his Successors*, as much as Tenant in Fee can bind his Heir. 221.

Bonds

Limitation of them; (i. e. their being supposed to be satisfied.)
434. See *Limitation*.

By-Law

In *Restraint of Trade*, is *not good*, *without* setting forth a *particular Custom* to support it. 16. 17.

Such a particular Custom cannot be *presumed*, if not set out. Ibid.

A By-Law (of the City of London) to *confine* a Person who has a Right to be free of the City, to take up his Freedom in *some one PARTICULAR Company*, is a *RESTRAINT of Trade*; And not a mere Regulation of it. Ibid.

Of a Company, “to elect upon their Livery, *such and so many of*
“their Members as should *seem* most meet and convenient to
“them; on pain to forfeit 25 *l.* on refusing to accept, or to pay
“the Admission-Fee.”

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- 1st. This is a *good* By Law. 239. 240. For the Court will *not* *presume* the Party elected upon the Livery to be *unfit* or *improper* for it. *Ibid.* And
- 2dly. If the Party was *really* unfit and improper, or had any other reasonable Excuse, "*Nil debet*" may be pleaded to the Action of Debt upon the By-Law: which will bring it properly before the Court; either by giving it in Evidence, or on Issue taken upon it. *Ibid.*
- By-Laws ought to have a *reasonable*, not a very rigid Construction. *Ibid.*
- A By-Law returned to have been *made by the Body at large*, may be good, where the POWER is by Charter given to a *select* Number "to make By-Laws in the *Stead*, *for*, and in the *Name* of the "*whole* Corporate Body:" For they *might* be, in Fact, made by the select Body *acting in the Name* of the whole Corporate Body; And the Jury having found "That the Body at large in *due manner* met, and in *due manner* made "them," It shall be so INTENDED. 131.
- A By-Law to *prevent* any Person from being made *free* of a Company, UNTIL He shall have been *called at three several Meetings* of the Mayor and certain Aldermen of a City, and the Wardens and Stewards of the several Companies in it, BEFORE *his Admission*; and to be *approved of* by them or the Majority of them, is good; and is *not a Restraint* upon Trade, but a *reasonable Regulation* of it. 131.
- A Mandamus will lie to *compel* such a Meeting. *Ibid.*
- A Mandamus will lie, if they *arbitrarily* and *without Cause* REFUSE to approve a proper Candidate. *Ibid.*
- Such *Meetings*, though not expressly returned to have been holden shall be *intended* to have been duly holden: For if in Fact they were not, it might have been pleaded by the Candidate as an Excuse for his not having been called and approved by them, previously to his Election. 132.
- The Jury having found "That He was not called and approved, PURSUANT to the By Law," implies that the By-Law was *in Being* at that Time, and not made subsequently. 133.
- Made "to GIVE *Power of Amotion* for just Cause"—would be a *good* By-Law; though the Corporation who made it, had *no* Power of Amotion expressly given by Charter, or claimed by Prescription. 539.

Cases doubted or Denied.

- 4 *Leon.* 9. *pl.* 39. was taken not to be Law now: per Lord Mansfield. *pa.* 6.
- 1 *Ventr.* 146. *Dyer v. East.* denied. 244. See *Statutes* (5. 6. E. 6. c. 4.) and *Prohibition.*

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- 2 *Ld. Raym.* 767. *Regina v. Taylor*—denied: Settled contra
 since. 252. See *Indictment*.
- 1 *Ld. Raym.* 724. *Cole v. Davies et al.* 1st. Position (“That no
 “Action will lie against the Sheriff”—) denied. 36.
Dyer 253. *b. pl.* 102.
- | | | |
|---|---|---|
| <p><i>Cro. Eliz.</i> 217. <i>Green v. Edwards</i></p> <p>1. <i>Co.</i> 153. <i>b.</i> Rector of <i>Cbedington's Case</i></p> <p><i>Sheppard's Touchstone.</i> 274.</p> <p>3. <i>Lev.</i> 334. 335. <i>Goodwin v. Blackman.</i> 330.</p> <p><i>Yelverton</i> 58. <i>King v. Gosper and Shire.</i> 412. 413. See <i>Common Recovery</i>.</p> <p>11 <i>Co.</i> 99. <i>a.</i> <i>Bagg's Case</i>, 2d. Resolution—denied. 538. 539. See <i>Disfranchisement</i>.</p> | } | <p>See <i>Term of Years</i>, and
 <i>Deeds</i>.</p> |
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Certiorari.

On 5. 6. *W & M. c.* 11. §. 3. No Costs are payable; unless the
 Indictment be brought by the *Party aggrieved*, or by Justices,
 Mayors &c or other *Civil Officers* prosecuting as being such.
 43¹.
 May be superseded, *quia improvide emanavit*; the return taken off
 the File; and Orders remanded. 488. 489. See *Quakers*.

Chancellor.

The Earl of Hardwicke, Lord Chancellor, swore in 3 successive
 Chief Justices of *B. R.* 1.
 Resigned the Seal. 20.
 Three Lords Commissioners received it. *Ibid*.

Chancery.

Decreeing Deeds fraudulent. *Pa.* 480. 481. See *Fraud, Bankrupt*.

Common

Is only a Right of *eating the Grass*, in a certain Place, by the
 Mouth of the Commoner's Cattle: But the Lord remains *Owener*
of the Soil; and may enjoy it *consistently* with his Grant, but *not*
contrary to it. 265 to 268.
 The Lord may place *Conies* upon his own Soil, though liable to
 Common. *Ibid*.
 The Commoner *may not chase, kill, or destroy* the Conies; though,
 by their Increase, there is *not sufficient* Common left: Much
 less may He *destroy the Burrows*, or *dig the Lord's Soil* for that
 Purpose

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Purpose. For the Lord's Act not being contrary to his Grant, the Commoner must take his *proper Remedy*. Ibid.

Indeed where the Lord acts *contrary to his Grant*, as by *inclosing*, and erecting Obstructions to keep the Commoners *out*, and not leaving sufficient, the Commoner may pull down the *Hedges* or *Erections*. Ibid.

But where there is only a *Sur-Charge* by the Lord, a mere *Excess of his Right*, the Commoner is *not* to be his own Judge, and to treat it as a Nuisance *abatable*. Ibid.

In a Justification under a Right of Common, Two essential Circumstances are, "That the Cattle be the Defendant's *own*," and "That they be *levant and couchant*." 320. See *Pleading*.

Common Recovery.

The *Rise, Nature, and History* of Common Recoveries, discussed at large. 115.

They are *now* a mere *Form of Conveyance*, allowed (under certain Circumstances of Form and Ceremony) to Tenants in *Tail in Possession*, generally; and to Tenants in *Tail in Remainder*, with *Consent* of the Owner of the first *Estate for Life*. 116.

A Recovery ought *not* to be *supported*, where the Parties had *no Power to suffer it*. 116 to 119. See *infra*, sub 1072.

The Statute of 14 G. 2. c. 20. proceeds upon the Parties to the Recovery having *Power to suffer it*. 116. See *infra*, sub 1074.

A *secret Feoffment* under a *naked Possession*, is not sufficient to support a Common Recovery suffered by the Remainder-Man. 117.

Those who have *no Power to suffer* a Recovery, shall not, by making an Estate by *Wrong*, or *Fraud*, or *Practice*, bar those in Remainder or Reversion: And such *fraudulent Estate* is as *no Estate*, in the Judgment of the Law. 117.

For, a Recovery which the Parties had *no Power to suffer directly* and *without* such fraudulent Estate, shall *not* be made good by *Wrong and Fraud*. Ibid.

A *Feoffee to the Intent to be Tenant to the Præcipe*, is a mere *Instrument* for one Purpose of Form only: His Wife shall *not be endowed*; His Statutes or Judgments shall *not affect the Land*; His Term shall not merge. Ibid.

A Man shall not, by his *own injurious Feoffment*, acquire an Advantage to himself: An Act founded in *Wrong* shall not, by *Virtue of the Crime itself*, become legal, for the *Author's Advantage*. 118.

On a Writ of Error to *reverse* it, there must be a *Scire facias* against the TERRE-TENANTS. 361.

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- 1st. This is necessary, not by *Law*, but by the *Course of the Court*. Ibid.
 - 2dly. The *Want* of it is (per Lord Mansfield) *only an Irregularity*. Ibid.
 - 3dly. The *Terre-Tenant* has *no Interest*; is *no Party* to the Suit; can *not plead in Abatement*; can plead *Nothing but a release of Errors*. 362.
 - 4thly. *Non-Tenure* pleaded by the *Terre-Tenant*, is (consequently) a *frivolous Plea*: And He shall *answer over*. Ibid.
- Error to reverse One (suffered by the Tenant in Tail) brought by the *Remainder-Man in Fee*: Who assigns for Error, “the *Death of the Vouchee*, before Judgment;” and concludes with an *Averment*. This *Vouchee* was the Tenant in Tail Himself. “*In nullo est erratum*” was pleaded. Judgment reversed. 412.
- 1st. The Writ of Error *needs not* set forth a *complete Title*: It is enough, if it shews *Connexion and Privity* between the Person who brings the Writ, and the Person against whom the Recovery was had. 412. 413.
 - 2d. A *Scire facias* to the *Heir* is not necessary; nor any *Warning to him*. Ibid.
 - 3d. *Death of the Vouchee*, before Judgment—may properly be assigned as Error. Ibid.
 - 4th. The *Conclusion* of this Assignment, with an *Averment*, is right Ibid.
 - 5th. The Pleading “*in nullo est erratum*,” confesses the *Fact* assigned for Error. 413.
 - 6th. The *Remainder-Man* has a *Right*, both in Law and Equity to reverse this Recovery, if erroneously suffered. Ibid.

Confession

Of a Charge, “in *Manner and Form as charged*,” confesses no more than such Matter *so* charged; and *no further*. 613.
See *Conviction*.

Conies

Placed upon *commonable Land*, by the Lord. See *Common*.

Construction

Of Statutes—

- 1st. There is a Distinction between Things *essential*, and Clauses *merely directory*. 447.

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- 1st. The *precise Time* is not always essential. 447, 450.
 - 2dly. Nor “*in or NEAR the Parish or Division.*” 447.
 - 3dly. But *Number* is essential. *Ibid.* to 451.
 - 2d. *Special Authorities* given to Persons who have no other Claim to them, must be *strictly pursued.* 447.
 - 3d. *Negative Words* are not necessary, to exclude from Jurisdiction Persons who had no Power before. *Ibid.*
 - 4th. *Different Statutes in pari materia*, (though made at *different Times*, or *expired*, or *not referring* to each other,) must be construed *together*, and as *One System*, and as *explanatory* of each Other: As *Bankrupt-Laws*, *Poor-Laws*, *Church-LEASE Laws* &c. 447.
- Of *Deeds*, especially such as execute *mutual Agreements for valuable Consideration*, should be *liberal, ut res magis valeat*, according to the *Intent.* 285.

Conviction

On the *Game Acts*—

- It must be *particularly and negatively specified* “That the Defendant had *not ANY* of the *Qualifications* required by 22, 23 “*C. 2. c. 25.*” 153 to 156.
- Though perhaps the *general Averment* “that the Defendant was “not qualified within the Acts,” may be sufficient in an *Action.* 153. *Sed Qu. per Foster.* 155.
- The *Evidence*, and the *Adjudication* ought, *Both* of them, to be “that the Person convicted had not the *Qualifications* specified “in 22, 23 *C. 2. c. 25.* nor any of them:” *Per Denison.* 154. See *supra* and *infra* 682.
- For *offering to Sale* a Parcel of Silk Handkerchiefs, and *trading* as a *Hawker, Pedlar, or Petty Chapman*, and *not producing a Licence*, when required; which the Defendant *confessed*, in *MANNER AND FORM as charged*: Quashed, because He does not appear to be *SUCH* a Trader as *ought* to take out a *Licence* with the Acts of 8, 9 *W. 3. c. 25.* § 1, 2, 3. 9, 10 *W. 3. c. 27.* § 1, 2, 3. 12 *W. 3. c. 11.* and 3, 4 *Ann. c. 4.* § 1, 4, 613, 614.
- 1st. A *single Act* of Selling is *not* a Proof of his being so. *Ibid.*
 - 2dly. The *Confession* does *not* prove his being so: Because it is only a Confession of the Fact, *in Manner and Form as charged.* *Ibid.*
 - 3dly. *Convictions* are to be taken *strictly.* 613.

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Copyhold.

If a Copyhold is granted for a Term of *Years*, the *Executor* of the Termor is obliged to be *admitted*: And the Lord is intitled to a *Fine*, upon such Admittance. 218.

Coroner. See *Deodand, Inquisition.*

If the Coroner *neglects* to make an Inquisition, *other Jurisdictions* may do it. 19.

But their Inquisitions are traversable. *Ibid.*

So also are the Coroner's: *Per Lord Mansfield. Ibid.* (Qu. If those of *Felo de se* are here included. 18, 19.)

Corporation: Corporator—

How to be *taxed*. 156 to 158. See *Tax.*

A Company's Right to have a *Livery* must be founded on Charter or Custom: The Court *cannot presume* that they have it. 237.

And if the Declaration (in Debt upon a By-Law) fails to *shew* it, 'tis such a Fault as the Defendant may take Advantage of, upon *general Demurrer*. *Ibid.*

Freedom of a Corporation may be restrained by By-Law. 132. See *By-Law.*

Election—given to "the RESIDUE (of the Portmen) or the " *greater Number* of THEM, *assembled* in the Council-Chamber;" and made by ONE *single* Portman *only*, being the ONLY One left: The Court *inclined* to *support* this Election; and declared this to be their Inclination, if it had been material to have determined it upon that Point; (which it was not, because They judicially determined the Case upon another Point.) 541.

Disfranchisement. 517. See *Disfranchisement.*

Costs

On discharging a Recognizance. See *Recognizance.*

On a feigned Issue. 603, 604. See *Feigned Issue.*

Upon frivolous Applications. See *Execution, Information.*

Covenant

In a *Building and Repairing Lease*, "to leave the DEMISED Premises, with all new Erections, *well repaired*,"—was construed to extend to the *new Erections only*; a Sum of Money being agreed

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agreed to be laid out in *new* Erections and *Re-building*; and the Covenant "to *keep* in Repair," extending *only* to *new* Erections. 290, 291.

Court.

The *Rules* and *Practice* of it. See *Practice*.

Rules of it—The great End of General Rules being "to do Justice," The Court ought to see that it be *really* attained. 301.

Spiritual—See *Prohibition*. 243, 244, and 315, and 367, 368, and 432.

Inferior. See *Inferior Courts*.

Of *Equity*—cannot decree a *Deed made by a Trader* to be fraudulent in Equity, which is not *fraudulent at Law* and an *Act of Bankruptcy*. 479, 481. See *Bankrupt*. See post. 1108. under Title *Court*.

Damages

EXCESSIVE. See *Verdict*.

Debt,

Extinguishment of it. See *Extinguishment, Pleading*.

Declaration

De bene esse, may (in certain Cases) be delivered at the Return of the Process, with Notice "for the Defendant to plead within eight Days after such Delivery:" And if the Defendant shall not file Common Bail, and plead within such eight Days, the Plaintiff (having first filed Common Bail for the Defendant) may sign Judgment for want of a Plea, (a Rule "to plead" being duly entered). 55, 56.

Sundays included in these eight Days, shall *not* be reckoned Part of them. 56.

Leaving in the Office is a good *Delivery* of such a Declaration. 56, 57.

No *fresh* Declaration, fresh Notice, or fresh Rule to plead is necessary in the above Case. 56.

A Judgment signed *six Weeks* after such Delivery of the Declaration *de bene esse*, was holden regular. *Ibid*.

On

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On a By-Law of a Company, in Debt, for not taking the Livery of it, must shew that the Company had a *Right* to a Livery: Otherwise it may be taken Advantage of, upon a general *Demurrer*. 237. See *Corporation*.

On a *Promissory Note*. See *Promissory Note*, and *infra*, 375.

Upon a *BAIL-Bond*—needs not set forth “that there was an “Affidavit of the Debt,” or “that the Sum sworn-to was “marked on the Back of the Writ. 332. For
1st. The Act of 12 G. 1. c. 29. § 1, 2. is *only directory*; and does *not* make the Process *void*. *Ibid*.

2dly. Yet as it *prohibits* the *Plaintiff* and the *Sheriff* from proceeding to arrest, unless the Sum be sworn and marked, *They* may be *liable to an Action* upon the Case for it. *Ibid*.

Upon a *General Indebitatus Assumpsit*: First Count, for 19*l.* lent and advanced, at the Defendant's Request; Second Count, for 15*l.* laid out and expended, at the Defendant's Request. The Evidence to support the 1st Count, was a *Note* acknowledging the Receipt of the Money on *Behalf* of the Defendant's Grandson (an Infant) and promising to be *accountable* for it on Demand: To support the 2d Count, a *Note* requesting the Plaintiff to pay it (“It is my Request that you pay it”) to the *Infant's Gardiner*, for the Workmen's Use. This Evidence *does support* the Declaration. 375, 376. For

1. Tho' *Indebitatus Assumpsit* will not lie, upon a *Note*; (because *Indebitatus Assumpsit* will not lie, but where *DEBT* will lie;) yet it may be brought FOR the *DEBT*; And the *Note* may be given in Evidence. *Ibid*.

2. This is an *original Undertaking*, not *collateral*. *Ibid*.

3. The *Infant* was not *liable* to an *Action*. *Ibid*.

Upon a *Prescriptive Right*—

1st. If there are *distinct collateral* Prescriptions, the Plaintiff needs not to shew any more than his own. 443 to 445.

2d. But if the Prescription be *entire*, and the Thing *Parcel* of the same Prescription or a *Condition precedent*, He must shew the Whole. *Ibid*.

3d. So He must against the *Owner*, or those who have Right. *Ibid*.

4th. But against a *Stranger* and *Wrong-Doer*, He needs not. *Ibid*.

Deeds

Especially such as execute mutual Agreements for valuable Consideration ought to be *construed* liberally, and agreeably to the obvious and apparent *Intention* of the Parties. 285, 286.

A Lease, by Indenture between the Lessor and a Mother *only*, (her Eldest Son being then under Age,) was made to her for 99 Years, if She should so long live; Remainder to her said Eldest Son, for and during the Residue of the said TERM:

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Yet the Court held this Lease to be clearly *intended* for the Benefit of *both Mother AND Son*; and that He and his personal Representatives should enjoy during the whole Remainder of the 99 YEARS; It appearing that the Son was to pay a *Penalty*, if He should grind at another Mill; and that a *Heriot* was payable by Him on the Death of his *Mother*, and that *Both* were to *repair*, and that the Lessor had covenanted that *Both* should quietly enjoy. *Ibid.*

Priority of Execution of Deeds of equal Date, is a *Fact*. But, if not found, the Court may judge of it by *Circumstances* and *internal Evidence*: They may even make a *Presumption*, in support of the clear Intention of the Parties. 106, 107.

Demurrer

General. The Want of *shewing a Right* in a *Company*. “to have “a *Livery*,” in a Declaration in Debt upon a By-Law, for not taking it, may be taken Advantage of, upon a *general Demurrer*. 237.

May not be *withdrawn* (with Liberty to plead to Issue,) *after Trial* of other Issues in the same Cause, and Verdicts found with Contingent Damages: Though this may be done, *after Argument* of the Demurrer, and whilst all is *supposed* to be in *Paper*. But the Court cannot help *seeing* that all is *not* still in *Paper*, after such Trial as above. 322.

Deodand. See *Coroner, Inquisition*.

Devise

Of all the Testator's Real Estate (except that at *Endellyon*) and of the *Perpetuity* of his Presentations, to *L. H.* for his *Life AND NO LONGER*; provided that He take the Name of the Testator, and live at his House of *Bochym*; and after his Decease, to such SON as He *shall* have, lawfully begotten, taking the Name of *Robinson*; and for Default of *such* Issue, then to *W. R.* in Fee — is, upon the true Construction of this Will, an Estate in *TAIL Male* in *L. H.* (He and the Heirs of his Body taking the Name of *R.*) by *necessary Implication*, to *effectuate* the *manifest general Intent* of the Testator; NOTWITHSTANDING the *express* Estate devised to the said *L. H.* “for “his *Life AND NO LONGER*.” 50, 51, 52.

Of all the Testator's Messuages, Lands, &c, to two Trustees and the Survivor of them and the *Heirs* of such Survivor, In Trust for the Benefit of the Testator's two Nephews; *viz.* that the Trustees and the Survivor of them, his *Heirs* and Assigns, shall lay

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lay out the Rents and Profits, for the *Maintenance, Education, Bringing up, and Putting out* his two Nephews, DURING *their MINORITIES*: And WHEN and AS they should attain their respective Ages of 21, to be and remain to the *two Nephews and their Heirs*, equally. And He made the two Trustees, his Executors.

1st. Wherever the *whole* Property is devised, with a particular Interest given *out of it*, the Operation of this is by Way of *Exception* out of the absolute Property. 233, 234.

2dly. Where an *absolute* Property is given; and a *particular Interest* given, in the *mean Time*, “until the Devisee shall come of Age &c; And when He shall come of Age, then to Him, &c;” The Rule is, that this shall *not* operate as a Condition *precedent*, but as a Description of the Time when the Remainder-Man shall *take in Possession*. *Ibid.*

3dly. This Devise to these two Trustees is *only an Exception out of* the absolute Property given to his Nephews: Or, indeed, scarce any Exception at all, as it is a Trust to be executed for *their Benefit*. *Ibid.*

4thly. It is *only a CHATTEL-Interest* in the Trustees, notwithstanding the Word “HEIRS”: For it cannot last 21 Years. 234.

5thly. This is an *immediate* Gift to the two Nephews, and vests in them *immediately*; with a *Trust* to be executed for *their Benefit, during their Minority*. *Ibid.*

In construing Wills—

1st. The *Intention* of the Testator ought to prevail, if agreeable to the Rules of Law. 233. So 272, 273.

2dly. *Adjudged Cases* may properly be argued from, if they establish *general Rules* of Construction. 233.

An Ordinary Man made his *own* Will, without any Assistance; And begins, “As to *all* my worldly Estate &c:” Then He gives some *small* Legacies payable in a Twelvemonth. Then (being seised of some Copyhold Land, and of five Houses,) He devises One of the Houses “to *W. T.*” (without any further Limitation;) making other Gifts to other Relations. Then He says, “That if *Either* of the Persons before-named die *without Issue* lawfully begotten, the *said* Legacy shall be divided equally between them that are left alive.” Note—One of the Legatees was Father to three of the Devisees. Resolved *per Cur’*.

1st. This is an Estate *Tail* in *W. T.* 272, 273.

2dly. The *Intention* of the Testator is to be here regarded. *Ibid.*

3dly. He plainly *meant* to extend the Word *Legacy* to his Devisees of *Land*; and *not to confine* it to *pecuniary* Legacies. *Ibid.*

4thly.

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4thly. The Word *Legacy* may be extended to *Devifes* of Land. *Ibid.*

5thly. A *Pecuniary* Legacy cannot be limited after a *Dying without Issue*. *Ibid.*

Of an *illiterate* Man, drawn by *Himself*, written upon Part of a *Sheet of Paper*; making his Wife sole *Executrix*; leaving the Interest of some Stock, to help to bring up his Daughter. “I likewise have two *Freehold Houses* &c: Which are to be for the same Use, to help to bring up my Daughter *Lavinia*, and her HEIRS FOR EVER. And if it please God my Daughter die BEFORE her MOTHER, and unmarried and without a lawful Heir, THEN the said two Houses to go to my Son JOHN and his Heirs for ever.” (*John* was Heir at Law.) This Will He subscribed: But it was neither sealed nor witnessed. About two Years after, He wrote a farther Memorandum on the SAME *Sheet of Paper*, bequeathing some *Personal Chattels* only; and therein declares “*This not to disannul any of the former Part made by me on 2d May 1752.*” This LATTER He subscribed in the *Presence of three Witnesses*; took the *Sheet of Paper* in his Hand; declared IT to be his last Will and Testament, in their Presence; delivered it to them, and desired them to attest and subscribe it in his and in each other’s Presence: Which they did.

1st. This whole Sheet is to be taken as *One entire Will*. 554 to 556.

2d. This latter Act is a good *Publication* of the whole Will, within the Statute of Frauds. *Ibid.*

3d. The *Interest* devised to the Wife and Daughter, are

1st. If not a *Chattel-Interest* to the Mother, and a Fee to the Daughter; 555, 556. Yet

2dly. At least, such an Interest in *One* or *Both*, as is sufficient to bar *John*, the Heir at Law and Devisee in Remainder, of his Ejectment. 554 to 556.

A Devise of *Lands* was attested by three Witnesses, *Squire, Baxter*, and *Higden*. *Baxter* and *Squire* were *Attornies*; and were employed by the Testator to solicit a private Act of Parliament for Sale of another Person’s Estate, and had charged the Testator Debtor to them, in their Books; and 318*l.* was owing to them at the Time of Attestation and Death: But They afterward delivered a Bill to the Trustees in the said Act (which contained a Provision for the Charges of passing it,) and before their Examination, received of the Trustees within about 16*l.* of their Demand, and the Trustees were willing to have paid the Remainder, if it had not been for a Miscalculation. And at the Time of Attestation, these Attornies were indebted to the Testator 138*l.* 14*s.* 10*d.* upon the Balance of a Current Account for other Business. *Higden* was the Testator’s Apothecary.

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thecary: And there was due to Him from the Testator, at the *Attestation and Death*, 18*l.* 5*s.* 5*d.* on *simple Contract*; viz. 11*l.* before the last Sickness; the Remainder, since. The Testator's Executor paid Higden this 18*l.* 5*s.* 5*d.* after the Testator's Death, but *before Higden's Examination*: And at the Time of his *Examination*, He had *no Demands*. The Will *charges* the Testator's *Real Estate* (as well as the *Personal*) with all his just *Debts*. But the *Personal Estate* was *sufficient* to pay all his *Simple-Contract* and *Bond Debts*: And the *Real Estates* in *Mortgage* were of *Value* more than sufficient to satisfy the respective *Incumbrances*.

Objection—"That these subscribing Witnesses were *not*, at the "Time of their attesting it, *CREDIBLE Witnesses*: And therefore it was *not a good Will of Lands*, within 29 C. 2. c. 3. as "not being attested by three *credible Witnesses*." But *per Cur.* unanimously. This Will was *DULY* attested by three Witnesses.

- 1st. The Epithet "*Credible*" is not synonymous to "*Competent*." Page 417.
2. The Consideration of *Credibility* arises *after Competency allowed*; and presupposes the Evidence given. *Ibid.*
3. The *Credibility* of the Witnesses makes *no Part* of the *essential Form*. *Ibid.*
4. This Epithet, "*Credible*," seems to have slipped into the Act, in this *inaccurate Clause*, without Attention to its *Impropriety*. 418.
5. The Act of 29 C. 2. c. 3. was *not*, probably, drawn by Lord Chief Justice *Hale*. *Ibid.*
6. The *Power of devising* ought to be *favoured*: And that Act of 29 C. 2. c. 3. did *not* mean to *restrain* it. 420. Its *Rise and Progress*. *Ibid.* It is *more* reasonable *now*, than among the *Greeks and Romans*, or before the *Conquest*: And *why* it is so. *Ibid.*
7. Judges ought to lean *against Objections to the Formality* of *Devises of Land*; which have overturned more fair Wills, than prevented fraudulent Ones. 421.
8. The *Disability* of a Witness, from *Interest*, differs from a *positive Incapacity*: And *nice Objections* of a *remote Interest* shall not disqualify a Witness, in Case of a Will. 422.
9. A Witness shall not *intitle Himself* to a *Devise*, by his own *Subscription*, which, at the *Time of subscribing*, He could not have proved by his *Examination*: (*For Testis in propria Causa non adhibendus.*) But if He had *as great an Interest*, the other Way; if his *Interest*, at the Testator's Death *could not take Effect*; if He has *released*; if

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- there has been *Payment*, or even *Tender*; He is a good Witness. Page 423, 424.
10. For *Presumptions of Bias* may be *taken off*; and *Presumptions of public Utility*, answered. Ibid.
 11. If Land is *charged with Legacies*, by a proper solemn Devise, the Legacies may be *given, altered, or revoked*, by a subsequent Will *unattested*. Ibid.
 12. *Presumption of Bias from a Legacy*, is taken off by a *Release*. Ibid.
 13. An *Objection to a Witness*, of "*Benefit at the Time of subscribing*," MAY be *taken off* by his being *disinterested at or after the Death*: (Though Lord Chief Justice Lee did indeed think it could *not* be taken off by *any subsequent Fact*.) 423 to 429.
 14. And this is consistent with the *Roman Law*. Ibid.
 - 1st. There *never* was a Time when *Interest* under a Will was, in the *Roman Law*, *any Objection* to the subscribing Witness. 425.
 - 2dly. The *Roman Law* concerning Testaments and Witnesses to them, fully *stated and explained*. Ibid. and 426.
 - 3dly. The *Code* was published *tertio Justiniani*; The *Digest* and *Institutes*, *septimo*. Ibid.
 15. *Devisees of Land* differ extremely from *Wills*: And *how*. 429.
 16. A *Devisee* under a *void Devise*, being a *subscribing Witness*, may by his Subscription authenticate the *Rest* of the Will: At least, there is great Weight in the Distinction said to be laid down by *Holt* Chief Justice, "*That such Will is only void, QUOAD the Devise to the Witness*." 428, 429. [N. B. This is contrary to the Opinion of Lord Chief Justice Lee. Ibid.]
 17. A *Charge* upon Land "*to pay Debts*" ought *not* to *incapacitate* subscribing Witnesses, who are Creditors; even though they wanted and claimed the Benefit of it: (Which, in this Case, they did not.) 430.
 18. Every honest Man *ought* to make *such a Charge* in his Will. Ibid.
 19. The most *usual* Witnesses are generally, in *some Degree*, *Creditors* of the Testator, (as Servants, Attorney, Parson, Apothecary, &c;) And the *Disallowing* such Witnesses can *answer no End* of public Utility. Ibid.

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Disfranchisement—See *Amotion*.

May be for *three* Sorts of Offences, *viz.* 1st. Such as are *infamous* in their Nature; but have *no Relation* to the Corporator's Office, As a Corporator: 2dly. Such as are *only* against his Oath and Duty, As a Corporator; 3dly. Such as are of a *mixed* Nature; being *not only* against the Duty of his Office as a Corporator, but *also indictable* at Common Law. Page 538.

First—For the *first* Sort, there must be a *previous Conviction* at Common Law, before Disfranchisement; (as in Cases of general Perjury, Forgery, Libelling &c;) *Although* the Corporation have Power of Amotion, by Charter or Prescription.

539.

Secondly—For the *second* Sort (where the Offence is *merely* against his Duty as a Corporator,) He can be *tried* for *such* Offences, *only* by the Corporation. 539.

POWER of *Amotion* is INCIDENT to Corporations, as much as the Power of making By-Laws: And therefore the Proposition collected from Bagg's Case, namely, "That they can have *no* Power of Amotion, *unless* given by Charter or Prescription," is *not true*. Ibid.

CAUSE of *Amotion*—ABSENCE of a Portman (whose general Duty is "to attend every Great Court, and advise and assist the "Bailiffs,") from five of these Courts in one Year, (four of them, occasional, and the fifth on a stated Day,) of the holding whereof respectively, DUE Notice had been given, but NOT PERSONAL Notice; without any Allegation "That the Portman's Presence was *necessary*," or "That any *particular* "Business was *obstructed* by his Absence," is *not* a Cause sufficient, either of Forfeiture or Amotion. 540, 541. For

1st. The Person amoved *might not know* of the occasional Courts, as He had not *personal* Notice. Ibid.

2dly. Or He *might not think* his Presence *necessary*. Ibid.

3dly. Or He *might not* imagine that there was any *particular* Business. Ibid.

4thly. Every Alderman, Common-Council-Man &c, in England would be liable to Disfranchisement, if it was otherwise: Because every One of these does, at Times, knowingly omit attending. 541.

5thly. Though the Charge here is of a "WILFUL Absenting," yet that is only a *Consequence of Law*; and there are *no issuable Facts* alledged, whereby the Court can judge "Whether the Absence was wilful, or not." 540.

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Disseisin.

The *Idea* of it, according to the *Old Law*, before the *Affize* of *Novel Disseisin*. Page 107 to 114.

The *precise Definition* of what constituted a Disseisin, such as made the Disseisor the *Tenant to the Demandant's Præcipe*, though the right Owner's Entry was *not* taken away, is *not now* known. 110.

It was, some way or other, turning the Tenant *out of his Tenure*, and *usurping* his Place and *feudal Relation*. 107, 109, 110.

It was a complicated Fact; and *differed* from *Dispossessing*: The Freeholder by Disseisin *differed* from a Possessor by Wrong, or mere *Intruder without Investiture*. 109, 110.

Cases where the true Owner thinks fit to *admit* Himself disseised, in order to bring his Affise, are *very different* from *actual* Disseisins in *Spite* of the true Owner, *i. e.* from such Disseisins as made the Disseisor *Tenant to every Demandant*, and Freeholder *de facto*, in *Spite* of the true Owner. 107 to 114.

Disseisin ever *implies* a *Wrong*: But *Dispossession* or *Ejectment* may be by Right, or by Wrong. 111.

Disseisin at *Election* is therefore very different from *actual* Disseisin: Though the same Term happens to be applied to Both. 111, 112.

The *Consequences* of *actual* Disseisins (considered as such) continue Law to this Day. 112.

Where an *Ejectment* is brought, there *can be no* Disseisin. 111. See *Ejectment*.

Taking Possession under a *Judgment in Ejectment* is *not* a Disseisin of the *Freehold*. 113. Nor can the true Owner even *elect* to make it so. 114.

For the Entry is under Authority, and *lawful*; and therefore *not* liable to be punished by *Fine*, (as every Disseisin was.) *Ibid.* Nor can the true Owner *enter* upon such Recoveror as a Disseisor. *Ibid.*

Distress

Averia Carucae are *distrainable* under 43 *Elix.* for *Poor-Rates*; and under such *like Acts of Parliament*; although there be other Goods, more than sufficient to answer the Value. 587, 588. For

1st. The Distinction is—That such Seisings for such Duties are *but partly* analogous to the *Common Law* Distress; but much more analogous to *Common-Law Executions*. 588.

2dly.

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2dly. *Common-Law Distresses* were to *compel Payment*; were *only detained, Nomine Pænæ*; and could *not be sold*: Whereas *these* are by Way of *Satisfaction* for the Debt; are *Distresses in Execution*; and are to be *sold* outright and almost immediately. Page 588.

3dly. The Statute of 51 H. 3. *de Districione Scaccarij* does *not extend* to these. *Ibid.*

4thly. The *Common-Law Exemption*, of Utensils, Tools, Implements of Husbandry &c, from Distress, *holds only* in Distresses for *Rent-Arrear, Amerciaments, &c*; but doth *not extend* to Cases where a Distress is given, in the *Nature of an Execution*, by any particular Statute, (as for Poor-Rates &c.) *Ibid.*

A Distress for an *entire Duty* shall *not be Split*; and a Distress taken for PART of the entire Sum at *one Time*, and for *other Part* of it at another Time: (For, that is great Oppression.) 589.

But if the Seizure be at first for the *Whole*; and only the *Value* of the Goods *mistaken*; the Execution may be *completed by a second Seizure*, provided it be for the *same Sum* due. 589, 590.

Excessive—A *General Action of Trespass* can not be maintained, for taking an excessive Distress: The Remedy ought to be by a *Special Action*, founded on the Statute of *Marlbridge*. 590.

Ejectment

WILL lie, by the Owner of the Soil, for Land which is Part of the King's High-Way. 143 to 147.

For, the Owner of the Soil has a Right to *All above and under Ground*; Except only the Right of *Passage*. *Ibid.*

Indeed He must recover the Land, *SUBJECT to the Easement*: And the Sheriff must deliver Possession, *SUBJECT to the Easement*. *Ibid.*

But yet He ought to have and has a *specific Remedy* to recover the *Land itself*. 144.

Of an Acre of *Land*, described only by the Name of LAND, tho' (in Fact) there was a *Wall*, and a *Porch*, and *Part of a House* built (by Encroachment) upon it—

1st. The *Description* of this, as LAND, is sufficient: For the Owner claims the Land, not the Nuisance erected upon it. 144, 145, 146.

2dly. More *Latitude* is allowed in Ejectments, than in real Actions: *Sufficient Certainty* is enough, in Ejectments. 144.

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The Plaintiff shall recover *according to his Title*, where He demands more than He has a Title to: For where *more* is laid, there is no Reason why He should not recover *less* than He demanded; though the *Reverse* will *not* hold. Page 329, 330.

Against Two: One died, after Issue joined, but before Trial.

1st. The Death must be *suggested on the Roll*, by 8, 9 W. 3. c. 11. § 7. But it is enough, if it be so on the *Plea-Roll*: But on the *Nisi prius* Roll, there needs be no more than enough to *notify to the Judge*, "What He is to try, and "between whom." 366.

2. The *Judgment* needs not say "*quod Querens Nil capiat per Billam* against the *dead Defendant*"; It being therein said "That *all Proceedings shall stay* against Her." 364, 366.

3. The *Judgment* is *not* to be "for a *Moiety* only": It must be "that He *recover his Term*." But He must take out *Execution* for no more than He had a *Right* to recover. *Ibid.*

Brought by the *Landlord* against his *Tenant*, under and by virtue of 4 G. 2. c. 28. § 2. and Judgment had against the casual Ejector, by *Default*; and *Possession thereupon delivered*. Near 20 Years after, the *Tenant brings an Ejectment* against the same Landlord, for the same Premises. The Landlord (who is Defendant in this latter Ejectment) is *NOT obliged to PRODUCE* such an *Affidavit* as this Clause requires as an *essential Requisite* previous to his original Recovery: For, as it was essentially requisite, the Court will *presume* "That there was One regularly then made, and that the Judgment was founded upon "it." 615 to 622. See *Statutes*.

In *Ireland*, was affirmed upon a Writ of Error here, *after a Verdict* in *Ireland* in C. B. and an Affirmance in B. R. there: Though many of the Descriptions were *unknown in England*. 624 to 631.

1st. The same *Precision* is *not* requisite in this fictitious Action, as in a *Præcipe* in a real Action. 629 to 631.

2dly. Nor so much Strickness as was *formerly* required even in Ejectments themselves. 630.

3dly. It is sufficient, without so precise an Exactness that the *Sheriff may know* without any Information, what He is to deliver Possession of: For the Plaintiff is to *shew the Sheriff*, and at his own Peril to take Possession of *only* what He is intitled to. 629, 630.

4thly. In *Ireland*, the following Descriptions were (after Verdict and Affirmance of the Judgment there *ut supra*) held sufficient: *viz.*

1. In the *County* of R. without naming any particular Vill. 624.

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2. *Town and Tenement of Boyle, and the Fairs and Markets thereunto belonging.* Page 625.
3. *Quarter.* Ibid.
4. *Part of S. M. and D.* Ibid.
5. *A large Deer Park in the County of R.* Ibid.
6. *A small Park or Field in the Possession of A. B. not saying where.* Ibid.
7. *The Quantity and Quality of the Lands not particularized.* Ibid.

Where an Ejectment is brought, there can be no *Disseisin*. For the Plaintiff may lay his Demise, when his *Title accrued*; and recover the *Profits from the Time of the Demise*. And the Entry confessed is previous to the making the Lease: But there is *no* real or supposed *Re-Entry*, after the Ejectment. Whereas, if it was considered as a *Disseisin*, no mesne Profits could be recovered *without an actual Re-entry*. 111. See *Disseisin*.

A *Judgment* in Ejectment is a Recovery of the *Possession*, without Prejudice to the *Right*: And He who enters under it, can only be *possessed according to Right*, prout *Lex postulat*. 114.

And He who recovers a *naked Possession* only, without Right, can convey *no other* to his Feoffee. Ibid.

An Ejectment is a *possessory* Remedy; and only competent where the Lessor of the Plaintiff *may enter*. 119.

Therefore it is always necessary for the Plaintiff to *shew* "that his Lessor had a *Right to enter*"; by *proving a Possession within 20 Years*, or *accounting for the Want of it*, under some of the *Exceptions* allowed by the Statute of Limitations. 21 Jac. 1. c. 16. Ibid.

Twenty Years adverse Possession is a *positive Title* to the Defendant: It is not a Bar to the *Action or Remedy* of the Plaintiff, only; but takes away his *Right of Possession*. Ibid.

Every Plaintiff in Ejectment must *shew a Right of Possession*, as well as of *Property*: And therefore a Defendant in Ejectment *needs not* PLEAD the Statute of Limitations, as Defendants in other Actions must. Ibid.

Upon a *Special Verdict* in Ejectment, it ought to *appear* "that the Lessor of the Plaintiff *might enter*, at the Time when He brought the Ejectment. Ibid.

A *Lease under a Power*, made *unfairly* and in *Prejudice of those in Remainder*, found in the *Custody of the Maker*, at his Death, amongst his own *Muniments*, ought, at the Trial, to be *presumed to have been surrendered*; to let in the Statute of Limitations. 126.

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Error.

The *Allowance* of a Writ of Error is the *Supersedeas*: The *Notice* of it's being allowed, relates only to the *Contempt* in proceeding subsequently to such Notice. Page 340. See *Bail*.

To reverse a *Common Recovery*. See *Common Recovery*.

To reverse an *Outlawry*. See *Outlawry*.

On a Judgment in Ejectment, where *B. R.* determined *for* the Plaintiff, upon the *Right*; but *against* Him, upon the *Remedy*; (for They held him *barred by the Statute of Limitations*;) The Lords, on Error brought by the Plaintiff, determined the *latter Point*, first and *separately*; And, holding the Plaintiff *to be* barred, affirmed the Judgment, *without ever entering* into the *other Point*, (upon the Plaintiff's *Right*.) 126, 127.

Escape.

Such as shall make a Trader a *Bankrupt*. 439, 440. See *Bankrupt*.

Evidence—See *Proof*.

A *Commission* under the *Exchequer-Seal* (tho' a Commission of *Instruction* only, *not* of *intitling*;) is *admissible* in Evidence, (though *not conclusive*.) 147.

Where a *Note* may be given in Evidence: And where it does or does not *support the Declaration*. 375, 376. See *Declaration*.

Extinguishment

Of an Original Debt. See *Pleading*.

Factor.

A Factor or Agent, to whom a *Balance is due*, has a LIEN upon all Goods of his Principal consigned to Him; not only for incident Charges, but as an *Item* of mutual Account for the *general Balance* due to Him; so long as He retains the *Possession* of them: But if He *parts with the Possession* of the Goods, He parts with his *Lien*. 494.

Feigned

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Feigned Issue.

The *Costs* upon it were directed to be taxed, FROM *the Time* when it was FIRST *ordered* by Consent of the Parties; (including the Disputes about *settling* it, but Nothing prior to it's being consented to.) Page 603, 604.

Feme Covert—See *Baron and Feme*.

Separated from her Husband. 542. See *Baron and Feme*.

Her *Will*, under a Power to make One. 432. See *Baron and Feme, Devise*.

Feoffment.

In general—The *Operation* of it. 92. (*per Knowler, arguendo*.)

The Nature and Operation of a Feoffment with a View *only* to make a Tenant to the *Præcipe*. 115 to 119.

A Feoffee to the *Intent to be Tenant to the Præcipe*, is a mere *Instrument* for One purpose of *Form* only: His Wife shall *not be endowed*; Nor his Statutes or Judgments *affect the Land*; Nor his Term (if He has One) *merge*. 117.

A Man shall not, by his *own injurious* Feoffment, acquire an *Advantage to Himself*: For an Act *founded in Wrong* shall not, by *Virtue of the Crime itself*, become Legal, for the Author's Advantage. 118.

Fines payable to Lords—

On *Copyholds* granted for Terms of Years. 206 to 219. See *Copyhold*.

Fraud.

Fraud or Covin may, in Judgment of Law, *avoid* every Kind of Act. 395.

INVALIDATES *as much* in a Court of LAW, as in a Court of Equity. 391 to 396.

“What Circumstances and Facts *amount* to Fraud or Covin,” is always a Question of LAW. 396. V. *infra*, 474.

Courts of Equity, and Courts of LAW, have a *concurrent Jurisdiction*, to suppress and relieve against Fraud: But the Interposition of the former is often necessary, for the *better investigating Truth*, and to give *more complete Redress*. 396. V. *infra*, 480, 482.

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“ Whether a Transaction be *fair* or *fraudulent*,” is often a Question of *Law*: It is the *Judgment of Law*, upon Facts and Intents. Page 474. V. *supra*, 396.

Courts of Equity cannot decree a *Deed* made by a *Trader*, to be *fraudulent*; which is not *fraudulent at Law*, and an *Act of Bankruptcy*. 480, 482. See *Bankrupt*.

Freedom

Of a Corporation—See *Corporation*, *By-Law*, *Mandamus*.

Freehold, Freeholder—See *Seisin*, *Disseisin*.

The *Idea* of a Freehold and of a Freeholder, according to the *ancient Feudal Law*. 107 to 114.

The *Idea* which *modern Times* annex to Freehold and Freeholder, is taken merely from the *Duration* of the Estate. 108.

Game—See *Conviction*.

Grants

OF Offices, by *Bishops*. 221 to 226. See *Bishops*.

Great Seal

Resigned by the Earl of *Hardwicke*. 20.

Delivered to three Lords Commissioners, *Willes*, *Smythe*, and *Wilmot*. Ibid.

Habeas Corpus.

AN *impressed Man* in Custody at the *Savoy*, brought up by his *Bail*, to be surrendered in *their Discharge*, must be first committed to the Custody of the *Marshal*; who must *instantly deliver Him* to the Keeper of the *Savoy*. 339, 340. See *Soldier*.

Issued in Vacation, returnable *immediatè* before the Judge at his *Chambers*, does not expire by the *TERM's coming on*, (so as to require

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require a *new Writ*;) But the Defendant may be brought *into Court*, upon the *OLD Writ*. Page 460. V. *infra*, 542, 606. And being then committed to the *Marshal*, if He has no Bail ready; (for the Court cannot commit Him to a King's *Messenger*;) He may be afterwards brought up *by RULE* from the Prison of this Court, *without* being obliged to sue out a *new Habeas Corpus*. Ibid.

Issued in Vacation: The Person was brought *into Court*, in *Term-Time*. 542. V. *supra*, 460.

For a *Wife*. 542. See *Baron and Feme*.

For a *young Lady*, who had been decoyed away from her Father; but now *desired* to continue with Him. 606. This *Writ also issued in Vacation*; And was returned in Court, (*ut supra*, 460, 542.) 606, 608.

No *Peer* or *Lord of Parliament* hath *Privilege* against being *compelled by Process* of the Courts in *Westminster-Hall*, to pay *Obedience* to a *Writ of Habeas Corpus* directed to Him. 632. See *Privilege*.

For an *impressed Man*—The Rule was discharged, upon the Merits; but *without Costs*. 637. And in another *impressed Man's Case*, the Man was discharged, upon the Merits: But the Court would *not give Him Costs*. 638.

Hawkers, Pedlars and Petty-Chapmen.

A *single Act* of Selling does not make a Man such a Trader as that He ought to take out a Licence. 613, 614. See *Conviction*.

High-Way—

The Owner of the Soil may recover it in *Ejectment*; but subject to the Easement: And He has a Right to the *Freehold* and all *Profits* above and under Ground, except only the Right of Passage. 143 to 147. See *Ejectment*.

Nuances NEAR it. 337, 338. See *Indictment* for a Nufance.

Repair of Roads or Highways, INCLOSED by the Owner of Lands adjoining—

1st. Such Owner may inclose, by his own Authority: But under two Conditions, viz.

1st. He is obliged to repair, till He throws up the Inclosure. 465.

2d. He must leave sufficient Space and Room for the Road. Ibid.

2dly. An open Road lying through open common Fields, an Act of Parliament (a private Act 15 G. 2. c.) was made for inclosing and dividing them. The Commissioners directed

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rected a public Road across them, (which Road had also existed before;) and then allotted the Lands. One, whose Lot adjoined to this open Road, inclosed it. He is *not* bound to repair it, under the general Rule (p. 465. *ut supra*;) But the *Hamlet remains* liable; as they were bound, before the Act, to repair the former Road. Page 465, 466.

Change or Alteration of a Road or Highway, must be by a Writ of *ad quod damnum*. 465.

Repair of a Road altered under an ad quod damnum—

1st. The Owner of the Land is *not obliged* to repair the *new* Road; even though it was at first an *open* Road, and the *Jury direct it to be inclosed*; 465.

2d. Unless the Jury *impose* such a *Condition* upon Him. *Ibid*.

Indictment

ON 5 *Eliz. c. 4.* may be found at a *City* or at a *Burrough-Sessions*: It is (by 31 *Eliz. c. 5. § 7.*) only *restrained* from being brought out of the *County*. 251, 252.

For a *Nuisance*, in erecting Buildings at the *PARISH* of *T.* NEAR the King's Common High-Way there, and NEAR the Dwelling Houses of several of the Inhabitants; and there making acid Spirit of Sulphur &c, &c; whereby the Air was impregnated with NOISOME and OFFENSIVE Stinks &c: To the *Common Nuisance* of all &c, inhabiting &c, and passing &c.

1st. This is a sufficient Charge of the *Hurtfulness*, under the Word "*noxious*." 336, 337, 338. However, *per Lord Mansfield*, *Unwholesomeness* is not essential: It is enough, if the Smell be *so* OFFENSIVE, as to render the Enjoyment of Life and Property, *uncomfortable*. 337.

2dly. NEAR the High-Way, and NEAR the Houses, is sufficiently certain. 337, 338.

3dly. "At the *PARISH*" is laying it sufficiently certain; without saying IN the *Town* or *Vill*. *Ibid*. And *per Denison*, "*Vill*" and "*Parish*" shall be considered as *co-extensive*, except on the Statute of *Additions*, and that of Appeals of Death. 337, 338.

On a Statute (1 *J. I. c. 22. § 50.*) giving Jurisdiction to the *Mayor* IN SESSIONS, an *Indictment* is the proper Method, as being the *ordinary* and *Common-Law Course*; (in which Course, this Jurisdiction ought to be exercised:) But an *Information* will not

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not lie; but shall be quashed on Motion, because there is no such Jurisdiction given. Page 389, 390.

For a Nuisance, in setting a Person (for several Days) in the Foot-Way of the public Street in London, to deliver out PRINTED BILLS of the Defendant's Occupation; whereby the said Foot-Way was greatly obstructed &c—was QUASHED; as being a Matter NOT indictable. 516.

Lies NOT, upon an Act of Parliament which creates a NEW Offence, and prescribes a particular Remedy. 545. (V. *infra*, 803 to 806.)

For exercising a Trade, contrary to 5 Eliz. c. 4. See Trade, Soldier, Statutes.

Inferior Courts.

Proviso of 21 J. 1. c. 23. viz. § 6. That that Act (made to prevent Removal of Suits) shall only extend to such as have an Utter Barrister for Judge or Deputy, and who shall be actually present at the Trial. 515. See *Procedendo*, Statutes.

They may set aside regular interlocutory Judgments, in order to let in a Trial of the Merits: But can NOT set aside VERDICTS, except for Irregularity; (not upon the Merits.) 571, 572.

Information

For a Challenge, was denied to the first Sender of it, (though the other accepted it, and even proposed to fight with Pistols:) And He was left to his ordinary Remedy, by Action, or Indictment. 316.

For a Challenge—A Rule “to shew Cause” was granted, upon producing only COPIES of the Letters containing it: But such Copies must be sufficiently verified. 402.

This extraordinary Assistance shall not be given to Cheats and Gamblers, against other Cheats and Gamblers (who have fallen out together:) But the Court will leave them to their ordinary Remedy. 548.

Against Justices of Peace, for REFUSING to grant a LICENCE to an Inn-keeper, under 26 G. 2. c. 31. was denied. 556 to 565. V. *infra*, p. 653, 654. and p. 1317, 1318.

1st. The Justices acting for the Division have the SOLE Discretion, without any Appeal from their Judgment. *Ibid*.

2d. But if They abuse this Trust, by exercising this absolute Discretion, with Partiality, Malice, or Corruption; and this be clear and apparent; They are liable to Prosecution by Indictment or Information, (possibly to an Action.) *Ibid*.

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3d. *Not for an Error in Judgment, if their Heart and Intention be pure. Page 563.*

Information in Nature of *Quo Warranto*.

FOR HOLDING A COURT OF RECORD, *within a Charter-Borough*, and *presiding* therein, in the Absence of the Bailiffs (to whom the Right of Holding it is given by the Charter;) He not being One of the Bailiffs: Which Information was brought by the Protonotary and Clerk of the Crown of the Great Session for *Denbigh*, at the Relation of *J. M. Esq;* "ACCORDING to *the Form of the STATUTE.*" The Defendant denies the Fact; and then disclaims. Judgment is given against Him; 1st. *Of Ouster*; 2dly. "That the Relator do recover his COSTS, ACCORDING to the Form of the Statute. On which Judgment, Error was brought.

1st. This is no Charge of usurping the Office of Bailiff. 407, 408, 409.

2d. The Act of 9 *Ann. c. 20. § 4, 5.* does not extend to the Exercise of such Offices *in Corporations*, as *do not relate* to Rights of Freedom: But is confined to *Corporate Offices*, and Rights to Freedom or other *Corporate Rights. Ibid.*

3d. It never intended to give *Costs*, in such Cases as the present; *not being a Corporate Franchise*, nor affecting *Corporate Rights. Ibid.*

4th. Yet a *Common-Law* Information in Nature of *Quo Warranto* will lie, for usurping it without Authority. *Ibid.*

5th. The *Common-Law Judgment*, "of *Ouster*," was affirmed: The *Statute-Judgment* "That the Relator recover *his Costs*," was reversed. 409.

Shall not be granted, *after a great Length of quiet and unimpeached Possession* of the Persons under whom the Defendant claims: The present Case was 29 Years: For, though there be *no Statute* nor even *fixed Rule* of Limitation, yet the Court ought to exercise a Discretion, after a *great Length of Time.* 433, 434.

Four Informations were CONSOLIDATED into ONE, upon 9 *Ann. c. 20. § 4.* Which permits such Leave of the Court, where the several Rights can be properly determined in one Information. 573.

Information *qui tam* &c.

For exercising a Trade, contrary to 5 *Eliz. c. 4.* not having served an Apprenticeship.

1. Being

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1. Being *laid* at a Parish, is no Reason to *quash* it on Motion. Page 366, 367.
2. Qu. Whether that Act extends to *Villages*, (as well as to Cities, Market-Towns, and Towns Corporate.) 366, 367.
3. It needs not be averred that the Defendant did not *then* (at the *Time of the Making* of the Act) exercise the Trade. 367.

Information does *not lie*, where the Jurisdiction is given to a Mayor IN SESSIONS; as on 1 J. 1. c. 22. (about *Cutting of Leather* :) The Proceeding must be in the ordinary Way, *i. e.* by *Indictment*. 389, 390.

A COMMON Informer is not intitled to the same discretionary *Indulgence* of the Court, as the Party *really injured*, suing for Justice and *Reparation*. 402. See *Practice*.

Inquisition—See *Coroner*.

If the *Coroner omits* to take an Inquisition upon an *untimely Death*, it may be done by Justices of Gaol-Delivery, Oyer and Terminer, or of the Peace. 18, 19.

But it must be done *publicly and openly*. Ibid.

For, if it be found *secretly and privately*, it shall be *quashed*. 19. Of *Instruction*; of *Intitling*. 147. See *Evidence*.

Insurance—See *Policy*.

Double—

- 1st. As between the *Insurers and Insured*, upon the Principles of Commutative Justice, there is no Reason why the Insurers should not pay the *Whole*, even upon a double Insurance; They having received a Premium for the whole *Risque*. 492.
- 2dly. But, before the Introduction of *Wagering Policies*, it was settled (upon Principles of Convenience,) “That a Person insured more than once should *receive but One single Satisfaction*”; and that the several Insurers should “All contribute *pro rata*.” Ibid.
- 3dly. And it is exactly the same Thing, whether a Person makes both Insurances in his *own Name*, or uses the Names of *Others for his own Benefit*. Ibid.
- 4thly. The Act of 19 G. 2. c. 37. expressly *prohibits Re-assuring*; unless the Assurer shall become *insolvent*, or a *Bankrupt*, or *die*: And directs that even then, “it shall be expressed in the Policy, to be a *Re-Assurance*.” 492, 493.

5thly.

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5thly. The *Idea* of a *double* Insurance is, where the *same* Person is to receive DOUBLE SATISFACTION for the *same* Loss, by Reason of *his* having made *two* Insurances upon the *same* Thing. Page 493, 494, 495.

6thly. But *various* Persons may insure *various* Interests, on the *same* Thing; and Each, to the whole Value; (as, the Master, for Wages; the Owner, for Freight; One Person, for Goods; Another, for Bottomree &c:) And this is not within the Idea or Reason of a double Insurance. *Ibid.*

7thly. If One Person insures the *Whole* with *one* Set of Insurers; And *Another* Person, with *another* Set; and the first Set are bound to pay the *Whole* to *their* Insured; They have a Right to *stand in his Place*, for a Contribution (if they can get it) to be paid by the other Set of Insurers to *them*. 495.

Intention of the Parties

Ought to prevail, both in *Deeds* and *Devises*, unless contrary to Law. 233, 272, 273, 285, 286. See *Construction, Deed, Devise*.

Issue—

Immaterial—See *Repleader*.

Judges of B. R.

At what *respective* Times the present Four were sworn-in. 1, 2.

Judgment

May be entered up *nunc pro tunc*, at the Discretion of the Court. 148 and 226.

As in Case of a Non-Suit. See *Non-Suit*.

In *Ejectment*, where *one* Defendant *dies* between Issue and Trial. See *Ejectment*.

Interlocutory, may be *set aside* by an *Inferior Court*, in two Cases; *viz.*

1st. For *Irregularity*. 571, 572.

2dly. *To let in a Trial of the Merits*; even though the Judgment be REGULAR. *Ibid.*

Jurisdiction

The *Want* of it, is a Reason for quashing an Information upon Motion. 388 to 391.

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Jurors, Jury—

Special—Fined 20*l.* apiece, for neglecting to attend a Trial at Bar.

Page 274. But the Fines were afterward *taken off*, at the Desire of those who *did* attend. 274.

Are the *strict and proper Judges* of Cases depending entirely on *Circumstances*; as Damages for *Criminal Conversation*. 609. See *Verdict*.

So, where the *Evidence is nearly in Æquilibrio*. 393, 394, 397. See *Verdict, Practice*.

But a *Verdict against Evidence*, or against *greatly preponderating Evidence*, may be set aside. *Ibid.* See *Verdict, Practice*.

Trials by Jury—

Could not now subsist (in *Civil Causes*) without a Power *somewhere*, to grant *New Trials*. 393. See *Practice*.

Justices of Peace.

A Justice of Peace was appointed *Overseer*. The Sessions, upon his Appeal, discharge the Order which appoints him so; It appearing unto them “That He had for some Years been, and
“ was at the Time of the Nomination, and also at the Time
“ of making the Order of Sessions, an *acting Justice of Peace*
“ for the said County, residing within the said Parish, and a
“ substantial Housekeeper there; and also a *Lieutenant of Marines* in his Majesty’s Service upon *Half Pay*; AND *that* there
“ are OTHER *sufficient* Householders within the said Parish, for
“ the doing such Office”: They THEREFORE vacate the Order which appointed Him Overseer; so far as it relates to Him. And the Court confirmed their Order; and quashed that of the two Justices which appointed Him.

1st. The *Sessions* have a *Right of Judging* upon Appeal, with the *same Latitude* of Discretion, as the two Justices had. 246, 247.

2dly. The Court will *intend* every Thing *in Favour* of the Justices, upon their *Orders*. *Ibid.*

3dly. They have *no Need* to give any *Reason*. *Ibid.* And if not, shall be presumed to have acted on *proper Grounds*. *Ibid.*

4thly. If they give *bad Reasons*, which contain their *whole Reasons*, and manifestly conclude *against* them, their Orders will be bad. *Ibid.*

5thly. But if they give *only* an IMPERFECT Reason, or an *inconclusive* One; (but not a *repugnant* One, or such as the Court are *obliged* to judge to be their *whole Reason*,

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and a bad One;) the Court ought to *presume* their Order to be *right*. Page 246, 247.

6thly. Qu. Whether the Offices of Justice of Peace, and of Overseer in his own Parish, are *compatible*. Ibid.

7thly. Qu. Whether an *Overseer* can appoint a Deputy. *Ibid.*

Refusing to grant *Licences* to keep Inns, or to sell Ale. 556 to 564, and 653. See *Licence, Information*.

Making a *Warrant of Distress* upon a *Poor-Rate*—

1st. No *Action* of *Trespass* will lie against the Justices, though the Rate and Assessment be bad; if It has *never been appealed from*. 581, 587.

2dly. Nor upon the *Warrant*, not being void so as to make it a *Trespass ab initio*. Ibid.

3dly. And the Justices can *not be Trespassers*, by what the *Officers* afterwards do. 587.

Committing both Husband AND WIFE, Parish-Poor, RETURNING to the *Parish* from whence they had been legally removed, without bringing a Certificate. 595 to 604. See *Parish-Poor*.

Land—See *Seisin, Disseisin*.

HOW alienated, in the Times of the ancient *Feudal Law*. 107. See *Alienation*.

Landlord. See *Rent, Tenant, Statutes*.

Leases—

Made under *Powers*. 120. See *Powers*.

A Lease is a Contract between Landlord and Tenant, by which *Both* are bound in *mutual Stipulations*: And it can be no Lease, unless some Person *agrees to hire* the Thing demised, and to *pay the Rent*. 122.

For, a *Sale*, and a Lease, are the *same Species* of Contract. *Ibid.*

Leather—

Cutting it. See *Statutes*—1 Jac. 1. c. 22. § 50. under p. 389, 390. and again under p. 498, 499.

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Legacy—

Is a *vested* Interest, when the *Time* is annexed to the *Payment* only; and *not* to the *Legacy* itself: Otherwise, where the *Time* is *Part of the Condition* of its becoming payable. Page 227.

The Term "*Legacy*" may be applied to *Land* as well as *Money*. 271 to 273. See *Devise*.

Licence—

To keep an Inn—The *Justices of the Division* have the sole Discretion. 556 to 565. See *Statutes* (26 G. 2. c. 31.) and *Information* (against *Justices*, for refusing One.)

To sell *Ale*. V. *supra*, and *Information*.

Limitation—

Of *Quo Warranto* Informations—See *Informations in Nature of Quo Warranto*.

Of *Bonds*—About 20 Years is commonly taken to be the *general Time*: But it has been left to a *Jury*, upon 18 Years (by Lord *Raymond*.) 434.

London—

Customs—

1st. If put in *Issue*, are triable by the Mayor and Aldermen, by the Mouth of their Recorder. 249. But there must be a proper *Surmise*, in order to this Method of Trial. *Ibid*.

2dly. The Recorder *certified ore tenus* at the Bar: (Which has not been *actually done* at the Bar of *this Court*, within 200 Years past.) 248, 249, 250.

3dly. The Custom certified by Him, was, "That if One
" Person has a House which has ANCIENT *Lights front-*
" *ing opposite* to or over an adjoining House or ancient
" Foundation of a House, the Owner of the latter HOUSE
" or ancient Foundation of a HOUSE, may exalt his House,
" or rebuild upon such ancient Foundation any new House,
" to ANY *Hightb* that he shall please, *against and oppo-*
" *site* to the said ancient Lights of the former, and thereby
" obscure them": But this Custom is confined to *Messuages*
or HOUSES; and does not extend to OTHER *Erections* or
Buildings. *Ibid*.

Mayor IN SESSIONS—His Jurisdiction under 1 Jac. 1. c. 22.
§ 50. about cutting Leather. See *Statutes*.

Lords—

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Lords—

Their Privileges. Page 632. See Privilege.

Mandamus—

TO *compel a Meeting* under a By-Law. See *By-Law*.

To *approve* a Person *arbitrarily* and *without Cause* disapproved of. See *By-Law*.

To a *Visitor* “to exercise his Visitatorial Power over the Temporalities of a Cathedral Church, concerning the intermediate Profits during the Vacancy of a Stall”—Denied; as being a Matter proper for an Action at Law. 567.

Maxims

“*Boni Judicis est, ampliare JUSTITIAM*”—is the true Text: Not “*Jurisdictionem*.” 304.

Money—

Payment of it into Court. 578. See *Practice*.

Mortgage—

By Bankrupts. 477, 478. See *Bankrupt*.

Mutual Debts. See *Set-off*, *Statutes*.

New Trial—See *Practice*, *Repleader*, *Verdict*.

FOR *Excessiveness of Damages*. 609. See *Verdict*.

Is no more than having the Cause more deliberately considered by another Jury; when there is a *reasonable Doubt*, or perhaps a *Certainty*, “That Justice has not been done.” 393. It is necessary to Justice, that unjust Verdicts should be reconsidered. *Ibid*.

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And it is always on Payment of *Costs*, to the Party in Possession of the Verdict. Page 394.

The Courts or *Law* grant New Trials of late Years, *more liberally* than they did formerly: And *why* they do so. 395.

The *Grounds* on which they ought to be granted. 393 to 398.

Non-suit.

Action against *Two*; Judgment AGAINST *One*, by Default; Rule for Judgment FOR the Other, as in Case of a Non-suit, pursuant to 14 G. 2. c. 17. § 1. Yet this Defendant cannot have his *Costs* taxed as in Case of a Non-suit; because the *Case of a Non-suit does NOT here exist*: For if the Plaintiff be non-suited, He must be out of Court as against *Both* Defendants; whereas He has obtained Judgment against *One* of them. 359.

Notice—

Of an *Inquisition at the Assizes*, upon an *untimely Death*, where the Coroner has omitted to take *One*—is necessary. 19.

Of being *elected on the Livery* of a Company—given, “to attend “at the next Court of Assistants, to take upon him the Livery.”

239, 240.

1st. The Notice shall be *intended* to be regular: *Per Denison*.

240.

2dly. A Livery-Man of the Company *ought to know* when the next Court is: *Per Lord Mansfield*. 239. Yet N. B. This Court was *uncertain*: For the *Time of Holding* it was appointable by the Master and Warden. *Ibid*.

To *Corporators*—Of Courts, which their general Duty obliges them to attend—Where it must be *personal*. 540, 541. See *Disfranchisement*.

Nuisance—

Calling a Thing a Nuisance (in a Plea) will *not make* it so: This can *not alter* the Law. 267.

The Person injured by a Nuisance may not *abate* the *Whole* of it, where it arises only from Excess; but only *so much* of it, as by its *Excess* above what is allowable, constitutes the Nuisance. 267, 268.

In occasioning *noxious* and *offensive* Stenches, in a *Parish*, NEAR the King's Highway, and NEAR several Dwelling-Houses. 336, 337, 338. See *Indictment* for a Nuisance.

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Offices.

GRANTS of them, by Bishops. Page 221 to 226. See *Bishops*.

Orders

Of Justices are intitled to all *favourable Presumptions*. 246, 247, 248. See this at large under Title "Justices of Peace."

Of Sessions, upon a *Turnpike-Act*, for *digging Materials* in PRIVATE Soil. See *Turn-pikes*.

An Order *needs not be so strictly in Form*, as an *Indictment* must: An *Alternative Charge* is *not good* in an *Indictment*; but *may be good*, in an Order. 400. This was an Order on 11 G. 2. c. 19. § 3. for preventing Frauds by Tenants: The Orders were affirmed; though it was objected, as follows, *viz.*

1st. That it is only an *alternative Charge* "That the Defendant aided and assisted in removing OR concealing the Tenant's Goods." *ibid.*

2d. It is not charged "That the *Tenant* Himself *did* remove them;" nor "That the Defendant aided and assisted HIM." *ibid.*

To appoint *Overseers*—appointing MORE than FOUR, is bad. 452. For *assessing one Parish*, in AID of another; pursuant to 43 *Eliz.* c. 2. § 3.

1st. If within the *same Hundred*, Two Justices have Jurisdiction. 576, 577.

2d. If the *Hundred is not able*, Then the SESSIONS are to assess any other Parish within the *County*. *ibid.*

3d. The *two* Justices must *shew* that both Parishes are within the *same Hundred*, or *Division synonymous or equivalent to Hundred*. 577.

* I have abridged the Cases under this Head, very fully; for the accommodation of Gentlemen who give their Assistance at the Quarter Sessions.

* Orders of Removal.

The general Rule how to *title* all Cases of this Sort. 52, 53.

*N^o. 131. The Justices have *no Power* to remove a married Woman from her *Husband's OWN Property*, upon her being *only* LIKELY to become chargeable. 53.

* N. B. These Numbers correspond with

the *Quarto* Edition of my Settlement-Cases: Wherein all these Cases are published *at large*; together with 130 others *prior* to them, and likewise such as are *subsequent* to them.

N^o. 132. The Tenant's being *rated* AND *paying the LAND-tax* amounts to such a Notice as gains him a *Settlement* under 3, 4 *W. & M.* c. 11. § 6: Although he be *repaid* it again, by the Landlord, (or a Tide-Waiter, by the Collector:) And this, though it be *two Quarters only*. 247, 248.

An

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An *Apprentice* (by Parish-Indenture) *voluntarily permitted* by her N^o. 133.

Master to go and work elsewhere for her own *Benefit*, and accordingly serving another Master in another Parish above 40 Days; then returning to her Indenture-Master, and staying with him only 8 Days, at the End of which, her Apprenticeship *expired*, is settled in that other Master's Parish, where She *served* 40 Days: For, such service was UNDER the Indenture, which was never discharged. Page 307, 308.

The WIFE and four Children of *Richard Crockford jun.* were re- N^o. 134.

moved from *Elvetham* to *Alton*: Which Order was confirmed by the Sessions; and both Orders were affirmed by this Court. This *Richard Crockford's Father and Mother* came by CERTIFICATE from *Alton* to *Elvetham*; where this Son was BORN, SUBSEQUENT to the Certificate. He became a hired Servant to Sir *Harry Calthorpe*, at *Elvetham* (the Place of Sir Harry's Residence,) and served him, in all, ten Years. But the LAST 40 DAYS of the second Year's Service was at *Scarborough*: Where, without ever quitting his Service, He applied to his Master, at the End of the second Year, to make a new Agreement for another Year. His Master said "It would be Time enough, when they returned Home to *Elvetham*." Whereupon the Servant continued on, for about six Weeks, till they returned. Then he was AGAIN hired by his said Master, for a third Year, at advanced Wages; and served it out, in *Elvetham*; and continued 7 Years more in the same Service, in *Elvetham*. After which, he married this Wife, and had these Children. 308.

1. The Wife and Children were properly removed to the Settlement of the Husband and Father of them: And if He should in future come to *Elvetham*, he may be removed by another Order. 308 to 314.

2. *Alton*, which gave the Certificate, was that proper Settlement. 310 to 314. For

1st. Though a Servant may gain a Settlement in a Place where his Master has none, or where the Master never resides himself; *ibid*.

2dly. Yet this Servant gained no Settlement at *Scarborough* (where his Master only went as a Casual Sojourner, not as an Inhabitant.) *ibid*.

3dly. Besides, here was not any Finishing or End of the original Contract, by what passed at *Scarborough*: On the contrary, it was adjourned and continued; And the Re-hiring for the third Year was transacted at *Elvetham*. So that the Whole was a CONTINUATION of the Original Service first BEGUN under the Certificate from *Alton*. *ibid*.

An Order of CONFIRMATION (upon Appeal to the Sessions) is conclusive, and binds all the World: But an Order of DISCHARGE or RE-

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REVERSAL is only final *between the two then contending Parishes*; And no *Third Person* is bound thereby. And *this Distinction* is fully settled, and quite just and reasonable: For the two contending Parishes have been fully heard; The third Parish, not at all. *Page 354 to 356.*

- N^o. 136. The CHILD of a Certificate Person, having regularly gained a Settlement in a *third Parish*, may, AFTER *that*, gain One in the certificated Parish. 357 and 358.
- N^o. 137. A *bonâ fide* Purchaser of a *small Purchase* under 30*l.* Value, if rated and paying towards the public Taxes of the Parish, does, by such being rated and paying, gain a Settlement that shall *continue beyond* the Time of his Inhabitaney. 370. For
- 1st. The 9 G. 1. c. 7. § 5. was only levelled against fraudulent Purchasers. *ibid.*
- 2d. The 3, 4 W. & M. c. 11. § 6. is not affected by 9 G. 1. *ibid.*
- 3d. The Parish is not obliged even by 17 G. 2. c. 38. to rate a Person unfit to be rated. 371.
- N^o. 139. A Hiring for Eleven Months “and to give a Month’s Service in, “beyond the Eleven Months”—is a Hiring for a Year. 372.
- N^o. 140. A Question was made concerning the Necessity of a Pauper’s taking out *Administration*, in Order to gain a Settlement: But this Question was not now determined; because it was holden to be stated as a Fact, “That the Pauper had a derivative Settlement” (*exclusive* of the Claim under *Administration*.) 435.
- N^o. 141. A Hiring for One Year, to wit, from Michaelmas 1752 to M. 1753, with Liberty “to let himself for the Harvest-Month, to any other “Person,” is no Hiring for a Year. 496, 497.
- The Construction has been favourable as to the Service; but more strict as to the Hiring. *ibid.*
- N^o. 142. An Apprentice (by *Parish-Indenture*, till 24) was, by a most explicit and formal AGREEMENT *between his Master and Himself*, DISCHARGED from his Apprenticeship, And the Indentures delivered up; the Apprentice being *then* UNDER 21. He then left his Master; and was regularly hired for a Year, and served for a Year in A. He gains no Settlement in A. 500, 501.
- 1st. The Infant’s Consent is of no Validity: (For, being under Age, He could not consent to his being discharged.) 501.
- 2d. The subsequent Service of the Apprentice, under the Hiring for a Year, gained no Settlement; as being by the Master’s Leave and Consent, and so a Service UNDER the Indenture. 501.
- 3d. For this is no EXPRESS and EXPLICIT Leave given by the Master to a PARTICULAR Service; but intended to be general, and even founded on a Mistake. *ibid.* See *ante*, under Pa. 307, 308.

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Daniel Harrison, Mary his Wife, and William their Son (an Infant) N^o. 14³.
 went by CERTIFICATE to reside at Cold-Ashton. Her Father, being possessed of a Term in a Tenement in Cold-Ashton, died intestate, leaving Her and Five other Children. Daniel and She and William (then under 5 Years of Age) entered and took Possession; and Daniel and Mary have occupied ever since, (being 29 $\frac{1}{2}$ Years :) But no Administration was ever granted either to them, or to any other Persons. William lived with his Father and Mother in the said Tenement, till ABOUT 8 or 9 Years ago: When he married, and lived separate, but gained no other Settlement. Daniel (the Father) served the Office of Tithingman for the said Parish, for half a Year, about 25 Year ago; and the same Office again, for another Half Year, about 5 Years ago; The Custom there being "to serve it for Half a Year only, at a Time." All of them were settled at Cold Ashton. Page 510.

1st. The 9, 10 W. 3. c. 11. mentions the "Taking a Lease of
 " a Tenant of 10 l. per Annum Value," or "Executing some
 " annual Office in the Parish," as the the ONLY Methods
 by which a Certificated Person can gain a Settlement. 507.

2d. But by a reasonable Construction, an ESTATE of a Man's
 own from which He cannot be removed, is within this Act.
ibid.

3d. The Office stated in this Custom is not an ANNUAL
 Office; but an Office for Half a Year only. 504.

4th. Daniel, the Father of William, here acquired such a
 Right as rendered him irremovable. 508, 509, 510.

1st. It was a 20 Years Possession: Which will maintain or
 defend even an Ejectment. *ibid.*

2dly. After so long a Possession, a regular Title to it shall be
 presumed. *ibid.*

3dly. As to the general Question "Whether the mere Pos-
 " session of a Term, by the sole Next of Kin, WITHOUT
 " Administration, be sufficient to render irremovable;"
 it is out of the present particular Case.

5th. William, the SON of Daniel, here gained a derivative
 Settlement in C. A. from his Father. *Ibid.*

1st. The Children of all Parents must have the Settlement of
 the Father, TILL they acquire Another for themselves.
Ibid.

2dly. A critical and severe Scanning of Words and Expres-
 sions shall not be admitted, to prevent this. *Ibid.*

An Order of Sessions made on Appeal is not obliged to state the Case N^o. 144.
specially: And, where their Expression is not absolutely clear
 and explicit, they shall be intended to have done right. 514.

An Unmarried Person, not having Child or Children, may be hired N^o. 145.
 for a Servant, and gain a Settlement by the Service: (by 3, 4 W.
 & M. c. 11. § 7.) 546, 547, 548.

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- 1st. Such Person must be unmarried, *when hired*. Page 546, 547 548.
- 2d. One was hired *conditionally*, being *then married*; His *Wife died*; then the Hiring was *completed* by the Principal, who stood at *Liberty to have diffented*. This Man was holden unmarried, when hired. *Ibid*.
- N^o. 146. An *Infant*, of 8 Years of Age, was hired, to work in Silk-Mills for 3 Years: But the Master was *not* to find *Diet*, or *Lodging*; And the SERVICE was to be *only Eleven Hours* in the fix Working-Days; and *all the Rest* of the Time, as well as on *Sundays*, the Child was to be at it's *own Liberty* and it's own Master. This gains no Settlement. 565, 566.
- 1st. Here is no Sort of Foundation for One, upon the Foot of an Apprenticeship. *Ibid*.
- 2d. As a *Hiring and Service*—It gains None. *Ibid*. For
- 1st. The *Infant* is *not bound*: Though an Infant has an *Election* to affirm his Contract if he pleases. 566.
- 2dly. The *Contract* itself is *not a Hiring for a Year*, within 3, 4. *W. & M. c. 11. § 7. Ibid*.
- N^o. 147. These Determinations (upon the Poor-Laws) ought to be according to *plain Common Sense*, without *Subtlety or Nicety*. 593, 595.
- A *Hiring* for a Year, was necessary by 3, 4 *W. & M. c. 11. § 7*: A *Service* for a Year was added by 8, 9 *W. 3. c. 30. § 4. 593*. And by the Latter, a CONTINUING and ABIDING in the *same Service*, during the Space of one whole Year, is made essential. *Ibid*.
- 1st. The *Master's Leave* makes it a *Continuance* in the same Service. 593.
- 2d. If there be a *continued Service* for a whole Year, it is enough; though the Hiring and the Service be *not Both* under the *same Contract*: Provided there be *both* a Hiring for a Year, and a Service for a Year. 592 to 596.
- 3d. A *small Interruption* of the Service shall not hurt. *Ibid*.
- 4th. But a *total Dissolution*, or an *absolute Discharge*, or what *entirely breaks the Connection*, is fatal to the Settlement: For it must be an *uninterrupted* (*i. e. an undissolved*) *Continuance* of the same Service. 593, 594, 595.
- N^o. 148. *Rating the House* to the Poor's Tax, *without* expressly naming the *Tenant*, is sufficient to gain a Settlement: The Land-tax, Poor's Rates, and all other parochial Taxes were *paid by the Tenant*; and the Receipts given to him, by the Overseers, in *his own Name*; and He had *agreed to pay them*. This Rate was "on T. "C." (who was the Landlord) "or Tenant." 623. *V. Supra* (under Pages 247 and 368.)

Overseer

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Overseer

A *Justice of Peace*, who was also a *Half-pay Lieutenant of Marines*, appointed Overseer of the Parish where He resides and acts. Page 246, 247. See *Justice of Peace*.
No greater Number than FOUR can be appointed. 445 to 453.

Outlawry.

Error (Writ of) to reverse an Outlawry. (The present One was in *London*, for *High Treason* in diminishing the Coin.) 638 to 643.

1st. After Plea, the Defendant may have *Counsel*, upon the *Collateral Matter*. 638.

2d. If, upon being arraigned, the Defendant pleads *Non-Identity*, it is to be tried *instantly*. 638, 639.

3d. If Error in *Fact* be alledged, the Attorney General may confess it, tho' not true: But He can not do so, if the Error assigned be an Error in *Law*. 642.

4th. Eight Errors were objected; (Which were not now determined).

1st. That the second *Capias* ought to have had either 3 or 4 *Months* between it's Teste and Return. 639.

2d. That there was a *Discontinuance* of Process. 639.

3d. That the Outlawry was said to be pronounced by Mr. King, the Coroner: Whereas the *Lord Mayor* is perpetual Coroner; and the Recorder is to pronounce the Outlawry. 639.

4th. That He is not said to be outlawed *secundum legem et consuetudinem regni*. 640.

5th. That the Name of Office (*Vicecomites*) is not set to the Return of the second Exigent. 640.

6th. That the Writ of *Proclamation* is tested and returned upon the same Day. And the Return does not specify the particular Proclamations. 640.

7th. That the Defendant was out of the Kingdom when the Outlawry was pronounced. 640.

8th. That the *Hustings* are not said to be holden "in and for the City of London." 640.

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Parish-Clerk.

THE *Office* and the *Fees* are (Both of them) of *temporal* Cognizance. Page 367, 368. See *Prohibition*.

Parish-Poor. See *Orders*.

RETURNING to the Parish *from whence removed*, without bringing a Certificate, is punishable by two Statutes, viz. 13, 14 C. 2. c. 12. § 3. and 17 G. 2. c. 5. § 1. by Commitment to the House of Correction &c. 596, 597.

1st. Qu. Whether a *previous Conviction* be necessary, upon the former Act: (The *Latter* expressly requires it.) 598 to 604.

2d. Qu. Whether a *WIFE* returning *with* her Husband, to the Parish from which Both were legally removed, and bringing no Certificate, is *liable* to Commitment, as well as the Husband. *Ibid*.

3d. Though 13, 14 C. 2. c. 12. § 3. is in express Words, *tied up* to Persons going to work in another Parish, yet it has always been considered as *general*, and *not* being tied up to that particular Case of going to work, only. 601.

4th. But a general Commitment to the House of Correction, “UNTILL discharged by due Course of Law,” (indefinitely, and without Limitation of Time) is *not* good within either Act: For the Former requires *Punishment as a Vagabond*; and the Latter requires the being kept to *hard Labour*, but *limits* the Confinement “*not to exceed One Month*.” 602, 603.

5th. An *Action* lies by *Husband and Wife*, against the Justice, for this illegal Commitment; although it arose from the Husband's illegal Act. *Ibid*.

Parliament,

Lords of it—Their Privileges. See *Privilege*.

Payment of *Money into Court*. See *Practice*.

Peace. See *Security of the Peace*, *Attachment*, *Articles*.

Peers

Their *Privileges*. See *Privilege*.

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Plea.

Immaterial. See *Repleader*.

Liberty to *amend* it. See *Repleader*.

Issuable (within the Terms of the usual Judge's Order, giving Time to plead, upon certain Terms, whereof One is "to plead an *issuable* Plea—") A Plea (to an Action upon a Bail-Bond) of 23 H. 6. c. 10. and that the Bond was taken for "Ease and Favour &c;" is an *issuable* Plea, within such Order. Page 605.

So is a Plea of *Tender*. 59. See *Pleading*.

But not a Plea in *Abatement*. *Ibid.* See *Pleading*.

Pleading.

An *Account stated* is no *Extinguishment* of the original Debt: And therefore it is no *Plea in Bar* to a Demand of a Debt of the *same Degree*. Neither can a *Note of Hand* be pleaded in Bar to an Action upon Simple Contract: Though a *Bond* may; because it extinguishes the Debt. 9. But One Bond cannot be pleaded to Another. *Ibid.*

A Plea of *Tender*, is an *issuable* Plea, within a Judge's Order giving Time to plead, upon the usual Terms "of *pleading issuably* &c." 59.

A Plea in *Abatement* is not so; (because it tends to delay the Plaintiff.) *Ibid.*

A Plea *calling* a Thing a *Nusance*, cannot alter its Nature and make it so. 267.

Repleader. See *Repleader*.

Issue must be taken upon a single POINT: But it is not necessary that that single Point should consist of a *single FACT only*. (As if the Defendant justifies under a Right of *Common*, It is a good Replication and not multifarious, to traverse "That the Cattle were the Defendant's *own*, AND that they were *levant and couchant*, AND that they were *commonable Cattle*.") 320.

Where the *whole* Plea is denied, the Replication must conclude to the *Country*: Where only a *particular Fact* is denied, it must conclude with an *Averment*. *Ibid.*

Where a *corrupt Agreement* is pleaded, the Replication may either reply "That the Bond was given upon another Account," and traverse the corrupt Agreement with an *absque hoc*; or may deny the corrupt Agreement *directly*, and conclude to the *Country*. 320, 321.

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Condition to *indemnify* against all Claim of Dower BY *a Widow*, and against all *Costs Charges &c* arising *therefrom*. Breach assigned, in a Bill in Chancery brought BY *the Widow's SECOND HUSBAND*, for *Arrears* of Dower: In which Suit, the Plaintiff in the present Action *had expended 8l. 10s. for Costs*. Judgment for the Plaintiff, on Demurrer. Page 575, 576.

1st. This is within the *Words and Meaning* of the Condition. 576.

2d. The Obligee, being already damnified, has an *immediate Right* to be *reimbursed*, without waiting the Determination of the Suit in Chancery. 576.

Policy of Insurance.

On an *East India-Ship*, it's Body, Tackle, Apparel &c, and other *Furniture*; against Perils of the Sea &c, and *Fire* (expressly;) to any Ports and Places beyond the *Cape of Good Hope*, and back to *London*. At *Canton*, the Ship stayed to *clean and refit*: In Order to which, All the *Sails and Furniture* were TAKEN OUT of the Ship, and put into a *Warehouse* built for that Purpose ON A SAND-BANK in the River there: *Where* they were accidentally *burnt*. This was found to be the *well-known and established USAGE*; and to be *prudent*; and to be for the general *Benefit* of the *Insurers* and All concerned. 347 to 353.

1st. This is a Loss *within the Words and Meaning* of the Policy. 347 to 353.

2d. If the Loss happens by the *Variation of the Chance*, or *Alteration of the Voyage*, or other *Fault* of the Owner OR *Master* of the Ship, the Insurer ceases to be liable. *Ibid.*

3d. Otherwise, if the Thing be done in the *usual Course* of the Voyage, or *ex justâ Causa*. *Ibid.*

4th. So, if a Ship, warranted to depart *with Convoy*, goes out of the Way in Order to have the Opportunity of Convoy, This is *no Deviation*. *Ibid.*

5th. The *essential Means* and necessary intermediate Steps must be taken to be insured, as well as the End. *Ibid.*

6th. What *must necessarily be understood*, makes a *Part of the Policy*, as much as what is expressed. *Ibid.*

7th. This is a Loss within the *Voyage*, though it happened (strictly speaking) upon *Land*. *Ibid.*

8th. But the Insured have no Right to *change the Bottom*; though to a better or stronger Ship. 351.

9th. A *Deviation* (without Necessity) *determines* the Policy, and *discharges* the Insurer. 351.

DOUBLE Insurance—What *is*, and what is *not* so; and it's *Effects*. 490 to 495. See *Insurance*.

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1000: Tax. See *Orders, Statutes*, (43 *Elix.* c. 2. § 1.)
Rates.

Powers.

'The Limitation and Modifying of Estates by Virtue of Powers, came from Equity, into the Common-Law, with the *Statute of Uses.* Page 120. *V. infra, sub pa.* 1146, 1147.

The *Intent* of the Parties who gave the Powers, ought to govern every *Construction* of them. 120.

They shall not be exceeded; nor their *Conditions evaded*; but shall be STRICTLY pursued, in *Form and Substance*: And all Acts done under a Special Authority, not agreeable to it, nor warranted by it, are VOID. 120.

"To make Leases," is, of all kinds of Powers, the most frequent. *Ibid.*

1st. The Plan of this Power "to make Leases" is for the mutual Advantage of Possessor and Successor. 121.

2d. The Successor therefore must not be prejudiced in point of Remedy or any other Circumstance of full and ample Enjoyment. *Ibid.*

3d. The two usual Methods of Leasing are, either "at the best Rent," or "upon Fines:" And the Conditions in Favour of the Successor must be pursued not only literally, but substantially. 121, 122.

4th. If the ancient Rent is to be reserved, It must be reserved with ALL the beneficial Circumstances. *Ibid.* and specifically too, (not generally only;) that the Remainder-Man may be under no Difficulty in avowing: For otherwise, it will be a void Lease, as against Him; though good against the Owner of the Inheritance. *Ibid.*

5th. It can be no Lease, unless both Landlord and Tenant are bound in mutual Stipulations. 122.

6th. Where the Lessee never executed any Counter-part; never entered; never covenanted to pay the Rent; never consented; never accepted the Lease, nor appears to have been in Possession of it, or perhaps ever known of it; and consequently, was never bound by it; Such a Lease is no Execution of the Power. *Ibid.* Especially, as there was no Clause of Re-Entry in it. 125.

7th. For every fraudulent, unfair, prejudicial Execution of such a Power, in respect of those in Remainder, is VOID at Law. 125.

8th. But it is no Objection to a Lease made under a Power, "That it is in TRUST for him who executes the Power:"

Pro-

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Provided the *legal Tenant be bound*, during the Term, in all requisite Covenants and Conditions. *Page* 124.

9th. The Lease intended by every Power of Leasing, is the *usual Husbandry Lease*, reserving a *Rack-Rent* 124.

10th. A Lease, by Virtue of a Power, *takes Effect out of the Settlement* that gives the Power. 123.

Practice. See *Process, Proceedings, Declaration, Pleading, Repleader.*

All *enlarged Rules* "to shew Cause," made in a preceding Term, must be brought on before the last Week of the Term next following; unless particular Leave be given to postpone. 9.

Verdict against Evidence is, in general, a good and constant Reason for granting a *new Trial*. 12. But

Such a Verdict being found for the *Defendant*, and the Action appearing to be *frivolous, trifling, and vexatious*, the Court *refused* to grant the *Plaintiff a new Trial*; notwithstanding it's being a *Verdict against Evidence*. *Ibid.* *V. infra*, 54, 353, 664, 665.

All *Causes standing for Argument* in the special Paper, to come on in the same *Order* in which they are there entered; and *so to continue to stand*, till they shall be argued: And none to be put off, without a previous Special Application to the Court. 52.

A *New Trial* shall not be granted, merely to *gratify litigious Passions*, upon every Point of *Summum Jus*, or in *hard Actions*, or after *unconscionable Defences*: *Though* the *Verdict* be *against Evidence* and the strict Rule of Law. 54. *V. supra*, Pa. 12. *infra* Pa. 664, 665.

All *Motions* really and fairly ready at the Bar, were ordered to be made *REMANETS*; and to be heard (though they take up 2, 3, or more Days,) before the Dignitaries and Seniors at the Bar shall be again called upon to move. 57, 58.

This Regulation of Motions at the Bar was made by Lord Mansfield, at his first Coming upon the Bench; but was otherwise, till his Lordship's Time, and especially in *Ld. Ch. J. Holt's Time*; when the junior Barristers used to attend many Days together, *without Opportunity* of making their *Motions*. *Ibid.*

Judgment entered nunc pro tunc. See *Judgment*.

A *Motion* for a *new Trial*, and a *Motion in Arrest of Judgment*, may not be made *both together*: The former *must precede*. 334.

Bail—The different Terms upon which they shall have *Time to surrender* their Principal, *after a Writ of Error* brought by him. 340. See *Bail*.

A *Verdict* obtained by *Stratagem* or *unequitable Methods*, shall be set aside *WITHOUT Costs* on either Side, at least; if not with *Costs*.

A TABLE of the Principal Matters.

Costs to be paid by the Party who so obtained it. 353. *V. supra*, under *Pa.* 12 and 54.

Scire facias against *Terre-Tenants*—See *Common Recovery*.

The Rule “about NOT *quashing on* MOTION, but putting to “demur,” does not hold; where the Court which is proceeding, *wants Jurisdiction* in the Case. 388 to 391.

An *East-India-Merchant* being bound, at *Bombay*, in a Bond conditioned “to appear in this Court, to answer the *Demands of a “Black Merchant there,”* was permitted to *appear here* and enter into a Recognizance with Sureties, in the Penalty of that Bond, and with the *like Condition*; after Notice to the *East-India-Company*. 398.

The Court will *not* set aside (even on an Offer to pay the Costs of it) a *regular Non prof.* obtained by the Defendant against a COMMON Informer: Whatever they might have done, if the Plaintiff had been the Party *really injured*, suing for Justice and Reparation. 401, 402.

Scire facias against *Bail*, AFTER *Surrender* of the Principal. See *Bail*.

Of bringing *into Court*, in *Term-time*, upon a *Habeas Corpus* issued in *Vacation* and returnable *immediatè*. 460. See *Habeas Corpus*, (under *Pa.* 460, 542, 606.)

Rule to *pay Money into Court*, and have it struck out of the Declaration; upon Payment of *Costs*; (in an Action upon the Case, for the Use and Occupation of a House;) was discharged as to the *Costs*; *i.e.* permitted to be done WITHOUT *paying Costs*;) the Plaintiff's Action appearing to be brought and kept on Foot, *very OPPRESSIVELY*. 578, 579.

On the *last Day of a Term*, an *Attachment* cannot be moved for; Except 1st. for Non-Payment of *Costs*; Or 2dly Against a Sheriff, for not returning a Writ. 651. Also it may be moved “to quash an *Indictment*” (on the last Day of a Term:) But “not to quash an *Order*.” Ibid.

Prebend : Prebendary.

Profits during Vacancy—Upon a Question about the *Right to them*, an *Action* at Law, or a *Bill* in Equity, is the proper Method: *Not a Mandamus to the Visitor*. 567. See *Mandamus*.

Prescription—See Declaration.

For a *Right of BURIAL* in a Chancel, claimed as belonging to his *Messuage*: It was stated “That he had such a Right; and “that *2s. was due to the Parish*, for EVERY Person buried “in the Chancel of that Church.” 443, 444.

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- 1st. This Payment is *not* a Condition *precedent*, or Parcel of the Prescription: Page 443, 444.
2d. But either a *Customary Payment*, or, at least, a *Collateral* Prescription. *Ibid*.

Privilege

Of *Attornies*—See *Attorney*.

Of *LORDS of Parliament*—does *not* extend to prevent the Court of King's Bench from enforcing *Obedience to a Habeas Corpus* “to bring up a *mis-used Wife*,” by *ATTACHMENT*. But the Circumstances of the Case must be such as *necessarily require* such a Method: And it must be *cautiously executed*. 631 to 636. (Where see all the Particulars of Earl *Ferrers's* Case, previous and subsequent to his Countess's Swearing the Peace against him.) *V. infra*, next Article.

No *Peer* or *Lord of Parliament* hath *Privilege of Peerage* or of *Parliament*, against being compelled by Process of the Courts in *Westminster-Hall*, to pay *Obedience* to a Writ of *Habeas Corpus*, directed to him. 632.

Procedendo

Denied to a *Burrough-Court*, who had tried a Cause *WITHOUT* the *PRESENCE* of an *Utter-Barrister* of 3 Years Standing: (For, by 21 J. 1. c. 23. § 6. Such an *Utter-Barrister* ought, in all Events, to be *PRESENT at the Trial*.) 515.

Proceedings

Set aside, for want of *Attorney's Name* to the Process; It being set thereto, *without* his Authority. 20.

Process.

Attorney's Name. See *Proceedings*.

Prohibition

To a *Visitor*. See *Visitor*.

Declaring in Prohibition—198, 199.

- 1st. The *Defendant* in Prohibition has, perhaps, a Right to demand it, where the Opinion of the Court is against him. 198, 199.

2d. But

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2d. But the *Party applying* for a Prohibition has *no* Right to insist upon declaring, when the Court are clear that his Application is groundless. Page 198 to 205.

To the Spiritual Court, to stay Proceedings on 5, 6 E. 6. c. 4. § 2: Which Act contains 3 distinct Clauses levelled against 3 distinct Offences in Churches and Church-Yards; viz. 1st. Quarrelling, Chiding, or Brawling by Words only; 2dly. *Smiting*, or laying violent Hands; 3dly. Striking with a *Weapon*, or drawing One with Intent to strike. (For which 2d Offence, the Offender is, *ipso facto*, to be deemed *excommunicate*.)

1st. The Ecclesiastical Court may proceed upon the *two first* Clauses; and are *not* to be prohibited. 243, 244. But 2dly. Upon the *third* Clause, there must be a *previous Conviction*, and a Transmission of the Sentence, and a Declaration. *Ibid*.

3dly. But if they proceed for *Damages*, on either Clause, they shall be prohibited. 244.

4thly. The Proceedings of the two Courts are *diverso intuitu*: This, to punish; that, to amend. 243, 244.

To the Spiritual Court—AFTER Sentence—

1. Shall *not* go, unless Defect of Jurisdiction appears upon the Face of the Libel. 315.

2. Nor even where they have *tried a Custom or Prescription*; Provided they have adjudged against it. *Ibid*.

3. *Otherwise*, where they have tried a Custom or Prescription, and adjudged *for* it; (because they will establish it upon *less* Evidence than the Common Law requires.) 315.

To the Spiritual Court, to stay Proceedings for restoring a Parish-Clerk, shall be granted: (For the *Office* and *Fees* are of *Temporal* Cognizance.) 367, 368.

To the Spiritual Court, to stay their Proceedings in a Cause relating to the *Will* of a *Feme Covert*, who had Power (by her Marriage-Settlement) *to make a Will*: Qu. Whether such Will must not be *proved* in the Spiritual Court. 432. See *Baron and Feme*.

Promissory Note. See Bill of Exchange.

If made payable *certainly and at all Events*, it is a good Note, within 3, 4 Ann. c. 9. § 1. Otherwise, if it be *contingent*, and *uncertain* whether it shall ever be paid at all, or not. 227, 228. See next below.

A promissory Note given to an *Infant*, payable *when He shall come of Age*, and specifying the particular Day, (viz. 12th June 1750,) is of the former Kind: *Ibid*. For

1st. This is *certainly and in all Events* payable. *Ibid*.

2dly. The *Distance of Time* makes no Difference. *Ibid*.

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3dly. Nor the *Adding* "that 'tis the Day of the Infant's
"Coming of Age." Page 227, 228.

4thly. It is *Debitum in præfenti*; though *solvendum in futuro*.
228.

In the Name of *Two*, but *signed by ONE only*; promising to pay
on the Death of *G. H.* "PROVIDED He leaves Either of Us
"sufficient to pay the said Sum; OR if We shall be other-
"wise able to pay it." 325, 326.

1st. This is *not a negotiable Note* within 3, 4 *Ann. c. 9. § 1.*
being *only eventual*, not absolute. *Ibid. V. supra.*

2dly. If it had, the Declaration might have been against that
One, *singly*, who signed it. 325.

3dly. But this Declaration was upon an *absolute Note*: Which
was not supported by producing this Conditional Note in
Evidence; but was a *Variance*. 325, 326.

Quakers

REFUSING to pay *Tithes, Rates* or other *Rights Dues*
or *Payments* to Churches or Chapels, for the Stipend or
Maintenance of the Minister or Curate, are *compellable* thereto,
(if *not exceeding 10l.*) by an Order of any *Two Justices* of the
County or Place, *Other than Patrons* or Persons any Way *in-*
terested (who may also order *Costs*, not exceeding 10s.) Which
Order may be *appealed* from, to the General Quarter *Sessions*;
but shall *not* be removed into *any other Court*, *unless* the *TITLE*
of such *Tithes Dues* or *Payments* shall be in *Question*. 485
to 489.

1. The Act of 7, 8 *W. 3. c. 34. § 4.* extends only to great
or small *Tithes* and *Church-Rates*; and is temporary: But
the subsequent Act of 1 *G. 1. Stat. 2. c. 6. § 2.* makes
the former perpetual, and *extends* it to *any Tithes* or *Rates*,
or *any* customary or other *Rights Dues* or *Payments* be-
longing to any Church or *Chapel*, which of Right by Law
and Custom ought to be paid for the Stipend or Mainte-
nance of any Minister or Curate officiating in any Church
or Chapel. 486.

2. Both Acts direct that the Proceedings shall *not be removed*
into *ANY other Court*, (except the Appeal to *Sessions*), *un-*
less the *TITLE* shall be in *Question*. 487.

3. They mean that the Title be *really* in *Question*, and
upon some *real Foundation* of Controversy: But the *mere*
general Scruple of the Quakers to pay any Demands of this
Nature

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Nature, and their consequential Assertion "That the Right " is in Question," (without shewing upon what Foot,) is not a sufficient Ground for removing such Orders. Page 488, 489.

4. These two Acts were made in *Favour* to, and for the *Ease and Benefit* of Quakers: And it would *frustrate their End and Intention*, if they might be thus *evaded*, either by their *Obstinacy* or mere general *Scruples*. *Ibid.*
 5. A *Certiorari* having issued, grounded upon a *positive*, but *general Affidavit* on the Part of the Quakers, "That they " *controverted the Title* to these Tithes before the Justices; " and that the Title to them *was REALLY in question*;" The Writ was *superseded* (upon it's appearing that this general Allegation and consequential Assertion had no better Foundation than their *Scruples* or *Obstinacy* as above,) *quia improvidè emanavit*; the *Return taken off the File*; and the *Order remanded*. 488, 489.
 6. But these Acts *never meant* to give the *Justices Jurisdiction* to determine upon the *Right and Title*, where they are *really in Dispute and Question* between the Parties. 487, 489.
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Recognizance

TO remove an Indictment from the Court of *Oyer and Terminer* at *Hicks's Hall*, is a Recognizance at *Common Law*, and not within the *Stat.* of 5, 6 *W. & M. c. 11. § 2.* 10.

Such a *Common-Law* Recognizance, not within the Statute, shall be discharged, upon the Terms of it being complied with; *without Payment of any Costs.* 10.

To remove an Indictment from the Quarter-Sessions, upon 5, 6 *W. & M. c. 11. § 2.* shall *not* be discharged before *Payment of Costs* to the *Prosecutor* (after *Conviction*;) if the *Prosecutor* be *PROVED by Affidavit* to have been a *Civil Officer &c*; *ALTHOUGH* his Name be *NOT INDORSED* as such, upon the Indictment: For the 3d Section does *not* require such an *Indorsement*, as *necessary* to the Court's giving him *Costs*; (though the 2d Section does indeed direct it to be done.) 54, 55.

But no *Costs* at all are payable on that Act; *unless* the Indictment was brought by the *Party grieved*, or by a *Justice, Mayor &c* or other *Civil Officer* prosecuting as such. 431.

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Recovery. See *Common Recovery*.

Rent.

Act of 4 G. 2. c. 28. "for the more effectual preventing Frauds
" committed by Tenants, and for the more easy Recovery of
" Rents and Renewal of Leases." Page 616. See *Statutes*,
Ejectment.

Repleader

Shall be *granted*, where the Issue joined is *immaterial* and *void*,
and does *not* at all *determine the Right*: Unless the Case itself
appear to be *so bad* that no *Manner of Pleading* could have
helped it. 301, 302.

So, where the Issue joined is *so very inconclusive*, that the Court
cannot tell how to *give Judgment* upon it. *Ibid*.

But where it clearly appears that the Defendant *can have no Title*
or Defence, whatever Shape or Form the Pleadings may be put
into, *there Judgment* shall be given and entered against him,
without awarding a Repleader. 299 to 306.

If a Repleader be awarded, it must be *WITHOUT Costs*. 304.

In an Information in Nature of *Quo Warranto*, against a Mayor,
He claims under an Election and Swearing pursuant to a *Mandamus*
under 11 G. 1. c. 4. and shews an Election accordingly,
and that he was sworn pursuant to the said Statute: But when
he comes to *specify* the Manner of his being *sworn in*, He (by
Mistake, in following an old Precedent) shews a *Swearing pur-*
suant to the Charter, but *not Agreeable to the Directions of the*
Mandamus-Act. The Replication takes Issue on *this Swearing-*
in: Which was found for the King; the Defendant *not being*
permitted to give Evidence of his being *sworn in pursuant to the*
Act; (which, however, was, the Fact.) The Court held it
right, that he was *not* permitted to give *such Evidence*. But
as *this* and *Eleven* other Issues were found for the King *with-*
out Evidence, they considered the Defendant's whole Title, as
One entire Title (though split into Parts by the Replication;) and
were unanimous in *setting aside the Verdict*, UPON Pay-
ment of *Costs* by the Defendant, and in giving him Liberty to
amend his Plea; as the best Method of Coming at the *true*
Justice of the Case. 301 to 307.

Return

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Return

To a *Certiorari*—may be taken off the File, on the Writ's being *superseded quia improvidè emanavit*. Page 487, 488, 489. See *Certiorari*.

Of “*Nulla Bona*” upon Executions against *Bankrupts*. 31 to 38.
See *Bankrupt*: And *post*. 817 to 820.

Roads. See *Highways*.

Rules and Practice of the Court. See *Practice*.

The great End of the general Rules of the Court is “to do Justice:” And therefore the Court ought to see that it be really attained. 301.

Security of the Peace. See *Articles of the Peace*.

Seisin. See *Disseisin*.

THE Idea of Seisin, according to the *Old Law*, in the Times of *Feudal Tenures*. 107.

It was the Completion of that *Investiture*, by which the Tenant was admitted into the Tenure; and *without* which, no Freehold could be constituted or pass. .107.

Livery of Seisin—

1st. Is *immaterial*, under a Lease by Virtue of a Power: Because the Lease takes Effect out of the Settlement, which gives the Power. 123.

2d. Mere Taking Livery, without Entry or Occupation, is *not* sufficient to charge with the Rent reserved. 123.

Settlement

Of Poor. See *Orders of Removal*.

Of Poor. The Determinations upon these Laws ought to be according to *plain common Sense*; without *Subtlety* or *Nicety*. 593, 595.

Sheriff.

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Sheriff. See *Return, Bankrupt.*

Soldier. See *Habeas Corpus.*

No Person listed according to 29 G. 2. c. 4. § 14. shall be *taken out* of His Majesty's Service by any Process other than for some *Criminal Matter.* Page 339, 340.

But He may be *Surrendered* by his *Bail*, in their own Discharge. *Ibid.*

1st. An *impressed Man*, in Custody at the *Savoy*, may be brought up by his *Bail*, by *Habeas Corpus*: And when surrendered, is to be first committed to the *Marshal*, and *instantly delivered* to his *Military Keeper* who brought him up. *Ibid.*

2dly. A *Soldier at Large*, (not in Custody at all,) is to be first committed to the *Marshal*, but *instantly set at large*: Per Lord Mansfield. *Ibid.*

A *Volunteer* under 30 G. 2. c. 8. is *not* privileged from Arrests: But Persons *compelled against their Wills*, are privileged by § 20. of that Act. 466.

Statutes. See *Construction.*

5 Eliz. c. 4. See *Trade and Trader*: See *Indictment* also; and *Information.*

5, 6 W. & M. c. 11. § 2. See *Costs, Recognizance.*

5, 6 W. & M. c. 11. § 3. The *Prosecutor* being a *Civil Officer* &c may be *proved by Affidavit*: It is not essentially necessary that it be *indorsed*, 54, 55. See *Recognizance.* And *V. infra.*

18 Eliz. c. 3. See *Orders of Bastardy.*

6 G. 2. c. 31. § 1. See *Orders of Bastardy.*

22, 23 C. 2. c. 25. See *Conviction.*

5 Ann. c. 14. See *Conviction.*

3, 4 Ann. c. 9. § 1. See *Promissory Note.*

5, 6 E. 6. c. 4. See *Prohibition.*

31 Eliz. c. 5. § 7. 251, 252. See *Indictment.*

9, 10 W. c. 15. See *Arbitration.*

11 G. 1. c. 4. See *Mandamus, Pleading.*

12 G. 1. c. 12. § 1, 2. See *Declaration on Bail-Bond.*

29 G. 2. c. 4. § 14. See *Soldier, Bail, Habeas Corpus.*

14 G. 2. c. 17. § 1. concerning Judgment as in Case of a *Non-suit.* See *Non-Suit, Judgment.*

8, 9 W. 3. c. 11. § 7. concerning Suggestion of Death of the *Party*, upon the Record. See *Suggestion.*

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- 5 *Eliz. c. 4.* concerning exercising a Trade in a *Village*. See *Information, Trade*.
- 3, 4 *W. & M. c. 11. § 6.* concerning Notice. See *Orders of Removal*, (under *Pa. 247, 370, 371.*)
- 9 *G. 1. c. 7. § 5.* } See *ibidem*.
17 *G. 2. c. 38.* }
- 26 *G. 2. c. 54.* (a *Suffex Turnpike Act.*) See *Turnpikes*,
- 29 *G. 2. c. 67.* empowering to dig *Materials* in *private Soil*. See *Turnpikes*.
- 1 *Jac. 1. c. 22. § 50.* (about Cutting Leather) gives the Jurisdiction to the Lord Mayor of London IN SESSIONS, within the City and within 3 Miles Compass of it.
- 1st. This is no summary Jurisdiction given to the Mayor, PERSONALLY. 389, 390.
- 2dly. But only as Head of his Court of Sessions. *Ibid.*
- 3dly. An *Information* therefore will not lie. *Ibid.* But shall be quashed on Motion. *Ibid.*
- 4thly. But the Jurisdiction must be exercised according to the Course of the Common Law; i. e. by *Indictment*. *Ibid.*
- 7 *Ann. c. 12.* See *Ambassador*.
- 9 *Ann. c. 20. § 4, 5.* See *Information in Nature of Quo Warranto, Mandamus*. And
- ✎ N. B. This Act is legally, clearly, and correctly drawn: Per Lord Mansfield. 407. Judge Powell was the Person who drew it: Per Foster Justice. 409.
- 5, 6 *W. & M. c. 11. § 3.* No Costs are payable; unless the Prosecutor be the Party grieved, or a Civil Officer &c. 431. See *Recognition, Certiorari*.
- 21 *J. 1. c. 19. § 2.* See *Bankrupt*. (under *Pa. 439, 440.*)
- 43 *Eliz. c. 2. § 1.* See *Overseers*
- 30 *G. 2. c. 8. § 5 & 20.* See *Soldier*.
- 17 *G. 2. c. 16.* A private Act for dividing and inclosing the Common Fields of Flecknow in Warwickshire. See *Highway*.
- 1 *Jac. 1. c. 22.* "The Duty of Tanners, Curriers, Shoemakers, and OTHERS Cutting of Leather.
- 1st. This Act was intended to secure the STAPLE of Leather; and is NOT confined to Persons occupied in the Trade of Cutting it. 498, 499.
- 2dly. The $\frac{1}{3}$ of the Penalty under § 50. belongs to the Lord of the Liberty of the Place where the Offence was committed; notwithstanding the Extension of the Mayor of London's Jurisdiction to 3 Miles Compass round it. 498, 499. (*V. Supra* under *Pa. 389, 390.*)
- 21 *Jac. 1. c. 23. § 6.* providing that this Act ("to prevent Removal of Suits from INFERIOR Courts of Record,") shall only extend

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- to such inferior Courts where an *Utter-Barrister* is Judge or Deputy, and there *PRESENT*. Page 515. See *Procedendo*.
- 21 *H. 8. c. 13. § 1.* prohibiting *Spiritual* Persons from taking *Lands to Farm*, creates a new Offence, and prescribes a particular Remedy: Therefore no *Indictment* lies upon it. 545.
- 3, 4 *W. & M. c. 11. § 7.* allowing *unmarried* Persons, not having *Child or Children*, to be hired and gain Settlements. See *Orders of Removal* (under *Pa. 547, 548.*)
- 29 *Car. 2. c. 3.* Of *Frauds*. See *Devise*.
- 26 *G. 2. c. 31.* for regulating the Manner of *licensing Alehouses*. 556 to 565. See *Licence, Information* (against *Justices* for refusing.)
- 3, 4 *W. & M. c. 11. § 7.* concerning Settlements under a *Hiring FOR A YEAR*. 565 to 567. See *Orders of Removal*.
- 9 *Ann. c. 20. § 4.* Several Informations in Nature of *Quo Warranto* consolidated into One against all the Defendants. 573. See *Information*.
- 43 *Eliz. c. 2. § 3.* about assessing One Parish in Aid of Another. 576, 577. See *Orders*.
- 8, 9 *W. 3. c. 25. § 1, 2, 3.*
 9, 10 *W. 3. c. 27. § 1, 2, 3.*
 12 *W. 3. c. 11.* } See *Hawkers, Pedlars and Petty Chapmen*: and See *Conviction*.
- 3, 4 *Ann. c. 4. § 1, 4.*
- 4 *G. 2. c. 28. § 2.* (See *Rent, Ejectment*.) It prescribes two Manners of recovering in an *Ejectment* brought by the Landlord; viz. by *Default*; and on *Trial*: In both which, it must be made to appear "That *Half a Year's Rent* was due; that there was no "sufficient *Distress*; and that the Lessor had *Power to re-enter*." In the former Case of Judgment against the *Casual Ejector* (and so also upon *Non-Suit* on not confessing *Lease Entry and Ouster*), This must be made to appear by *Affidavit*: In the latter Case, the same Thing must be proved upon the *Trial*. 620.
- 1st. This is a very different Case from that of the *Defendant in an Action for the MESNE PROFITS*, not being estopped from going into the Title, by a Judgment against the *Casual Ejector*, (to which Judgment, *He was no Party*.) 620.
- 2dly. The End and Intent of this Act was to limit and confine the *Tenant* to *Six Calendar Months*, after Execution executed; for offering Compensation or applying for Relief in Equity. 619 to 621.
- 4, 5 *Ann. c. 16. § 8.* } See *View*.
- 3 *G. 2. c. 25. § 14.*
- 18 *E. 1.* "*Quia Emptores Terrarum*"—it's Effect. 108. See *Alienation*.
- 13 *E. 1.* "*De Donis conditionalibus*"—when and how evaded. 115.

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- 14 G. 2. c. 20. is a *retrospective* and *declaratory* Law; and seems to have restored the *Original Tenant to the Præcipe*. It proceeds upon the Parties to a Recovery having *Power to suffer it*. Page 116. See *Common Recovery, Tenant in Tail*.
- 21 Jac. 1. c. 16. "Of Limitations." 119. See *Ejectment*.
- 1 Eliz. c. 19. § ult. (concerning Grants by Bishops.) 221 to 226. See *Bishops, Grants, Offices*.
- 1 Jac. 1. c. 15. § 2. 467. See *Bankrupt*.
- 7, 8 W. 3. c. 34. §. 4. } 485, 486. See *Quakers, Tithes*.
- 1 G. 1. Stat. 2. c. 6. §. 2. }
- 19 G. 2. c. 37. 492. See *Insurance (double.)*
- 51 H. 3. *de Distractione Scaccarii* does not extend to Distresses in Nature of Executions for Poor's Rates and such like. 586, 588. See *Distress*.
- 13, 14 C. 2. c. 12. § 3. 17 G. 2. c. 5. § 1. relating to Poor Persons legally removed, and afterwards RETURNING to the Parish from whence removed, without bringing a Certificate. 596 to 603. See *Parish-Poor*.

Suggestion

Of the *Death* of One of the Parties. 366. See *Ejectment* (against Two; One dies &c.)

Sunday

Included in Days of Notice. 56. See *Declaration (de benè esse.)*

Supersedeas

To an *Action*. See *Practice, Prisoners*.

Tax.

Corporation of the *Royal-Exchange Assurance Company* in *London*, are liable to be assessed in their *Corporate Capacity*, As a *Corporation*. 156 to 158.

First—The 30000 *l.* or rather 1500000 *l.* (*viz.* the Sum of Money exempted by 6 Geo. 1. c. 18. § 2, 5, 10.) is confined to the *Original Fund* and Company established by that Act; and does not extend to the *present Corporation*, since founded upon a *Charter* of the *Crown*, which neither did nor could give any such *Exemption*. 156.

Secondly—

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Secondly—They ought to be rated As a *Corporation*; not as *Individuals* (in their respective Wards.) Page 157.

Term (of Years.)

Long Terms for Years are *modern* Contrivances, unknown to our Ancestors, and *different* from their Notions concerning Terms for Years. 217.

Copyholds, for Term of Years. 218. See *Copyhold*

Lease for *Years*, if Lessee so long live; Remainder to Another, for and during the *Residue* of the *same* TERM. This (notwithstanding former Cases which say “That the *Residue* of the *Term* is *void*, “because the *Term* is at an End by the Death of the Lessee,”) shall be construed That the Remainder-Man shall enjoy during all the *Residue* of the YEARS *to come*; where the manifest *Intention* of the Parties appears to be so. 285, 286. See *Deeds* (under *Pa.* 285, 286.) and see *Cases denied*.

The Word “Term” may signify the *Time*, as well as the *Interest*. 285, 286.

The Old Cases held “That there could be *no* Remainder of a “Term, after an Estate for Life; either by *Deed*, or *Will*.” But when *long and beneficial* Terms came in Use, such Limitations were first allowed to be created by *Will*, (under the Name of *Executory Devises* :) And afterwards, Remainders were allowed by *Deed*, for the *Residue* of the *Years*, but *not* of the *Term*. But now Limitations of Terms are of *general Use*; their Bounds settled; and the *Rules* concerning them *certain and established*. 285, 286.

Term.

Motions allowable or not allowable, on the *last Day* of it. See *Practice*.

Lithes

Payable by *Quakers*. 485: See *Quakers*.

Trade and Trader. See Bankrupt.

A Person *not* qualified to exercise a Trade, *himself*, by having served an *Apprenticeship*, entering into *Partnership* with a *qualified* Partner, and only Sharing the Profits and standing the Risques of the Partnership, *WITHOUT ever exercising or interfering* in the Trade himself *personally*, is not within the prohibitory and penal Act of 5 *Eliz.* c. 4. so as to be liable to the Penalties of it. *Pa.* 5 to 10.

Restraint

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Restraint of it. See *By-Law*.
Regulation of it. See *By-Law*.
In a Village. See *Information*.

Treason.

Dr. Hensley's Trial, for High Treason in *adhering to and aiding and corresponding with* the King's Enemies: The summary History of it. Page 643 to 652.

- 1st. The Grand Jury brought in this Bill, *by itself*. 643.
2. The Indictment *was read to him*, upon his Arraignment: Though He had a Copy of it five Days before. *Ibid*.
3. Papers found in the Custody of the Person Himself may be read against him, if proved by the Evidence of those who have seen him write, or know his Hand. 644.
4. Where the Defendant gives no Evidence, the Counsel for the Crown may decline to *sum up their own*. 645.
5. Letters of Intelligence written and sent, in order to be delivered to the Enemy, are, though INTERCEPTED, Overt-Acts of both the following Species of Treason, viz. *Compassing and Imagining the King's Death*, and *adhering to his Enemies*. 646, 647, 650.
6. *Levying War* is an Overt Act of *compassing* the King's Death. 646.
7. *Overt Acts of the Intention of Levying War* are Overt Acts of such *Compassing*. *Ibid*.
8. Soliciting a Foreign Prince, even in AMITY with this Crown, to invade the Realm, is such an *Overt Act*. *Ibid*.
9. Some One Overt Act must be proved in the County where the Indictment is laid. 647.
10. A Letter dated from a Place which lies in that County, is sufficient for such Proof. *Ibid*.
11. A Month's Time was allowed, between Sentence and the Day appointed for Execution. 651.

Trial

New. See *New Trial*.

Put off, upon Account of a Libel published with Intention to Influence the Jury: But shall not be again put off till after Trial of an Information against the mere Pamphlet-Sellers. 512.

Trial at Bar

Concerning a Right to a Track-Path on each Side of the River Tees (alternately) for towing, without paying any Acknowledgment—The Right found. 292.

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Concerning *Fines* payable to the Lord of the *Barony of Gillefland*, and their *Liberty of Exchanging*—Found for the Tenants. Page 333.

Trover

Is a *Fiction*, in it's *Form*: But, in it's *Substance*, a *Remedy*. 31. It is a *Remedy* to recover the *Value* of perſonal Chattels, wrongfully converted by Another to his own Use. 31. The *Form* ſuppoſes that the Defendant may have come *lawfully* by the Goods. 31. And it lies in *ſuch* Caſes. *Ibid.* Where they were *taken wrongfully* and by *Treſpaſs*, the Plaintiff, if he brings this Action, *waves the Treſpaſs*, and *admits the Poſſeſſion* to be lawful. *Ibid.*

It may be brought for an *unlawful Converting*; though the *Original Poſſeſſion* was *lawfully obtained*: But *no Damages* can be recovered in *this* Action, for the *mere Taking*. 31.

It is an Action of *Tort*: But the *whole Wrong* conſiſts in the wrongful *Conversion*. *Ibid.*

Two Things only are neceſſary to be *proved*, to intitle the Plaintiff to recover in it; *viz.* *Poſſeſſion*, in the Plaintiff; and a *wrongful Conversion*, by the Defendant. *Ibid.*

It is maintainable by the *Aſſignees* againſt a Sheriff, who *ſells* the Goods of a Bankrupt, (before taken by him in Execution,) AFTER *Aſſignment*: For *after Aſſignment*, they become the *Property of the Aſſignees*, from the *Time* of the Bankruptcy, by *Relation*. 31, 32.

Trover therefore lies againſt the Sheriff, for this *unlawful Conversion*: Though this *Relation* ſhall not make him a *Treſpaſſer* or *Wrong-Doer*, where the *Original Taking* of the Goods, was *prior* to the *Aſſignment*, and *lawful*. 35 to 38.

In *Trover*, the Plaintiff *waves the Treſpaſs*; and relies upon the *unlawful Poſſeſſion*, only. 31.

Turnpikes.

It is neither uſual nor convenient, to erect them in the *Middle* of Great Towns. 376, 377.

The Town (itſelf) of *Battel* is EXCLUDED out of 26 G. 2. c. 54. *Ibid.*

An Act impowers to *dig Materials* in *PRIVATE Soil*: (29 G. 2. c. 67.) The *Seſſions* make an *Order* upon it: Which was quashed. 383.

1st. EXPRESS *Adjudication* is not neceſſary, where the *Recitals* and *Allegations* are *ſtrong*, and *Concluſions* are actually drawn. 382.

2d. Yet

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- 2d. Yet the *Foundations* of their Authority ought to appear upon the *Face* of the Order, some how or other. Page 382.
- 3d. Notice to the OWNER of the Soil is not always necessary. 382.
- 4th. But *Satisfaction* is, wherever *He* is injured. *Ibid.*
- 5th. The Order must SPECIFY what Materials can *not* be found in or upon the *Wast*, and what *may* be found in the private Soil. 382.
- 6th. And also *fix* the *particular Part* of the Private Property. *Ibid.*
- 7th. For they cannot order a Digging over the *whole* Estate, in general. 382, 383.
- 8th. Nor can they dig the private Property, to TRY for *Materials*, without *knowing* or at least a *reasonable Prospect*, that they shall find them there. *Ibid.*
-

Verdict

AGAINST Evidence. See *Practice, New Trial.*

Without Evidence. See *Repleader, New Trial.*

Obtained by Stratagem or unequitable Methods. 352, 353. See *Practice.*

Wrong delivered by the Foreman—may be amended. 384, 385.

May NOT be set aside by an INFERIOR Court; except for Irregularity or Surprise: But not upon the Merits. 571, 572.

Shall not be set aside for Excessiveness of Damages, in Cases turning upon CIRCUMSTANCES, which are strictly and properly WITHIN the PROVINCE of the Jury: (As, for Criminal Conversation with the Plaintiff's Wife.) 609.

Where the Evidence which supports it, is clear and full, shall not be set aside. 394 to 398.

But where the Verdict is against Evidence, or against the Weight of it greatly preponderating, it shall. *Ibid.*

Fraud will invalidate, in a Court of Law, as well as in a Court of Equity: And where it has interfered, the Common-Law Court have a concurrent Jurisdiction with a Court of Equity, to set aside the Verdict. *Ibid.*

Set aside—The Antiquity of this Practice; The Rule of it; The Reasonableness of it. *Ibid.*

General Verdicts can only be set right by a New Trial. 393. See *New Trial.*

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Most General Verdicts include legal Consequences, as well as Propositions of Fact. Page 393.

Wetting

Of Legacies. See Legacy.

Of Remainders. See Devise.

Of devised Interests. See Devise.

View.

By 4, 5 Ann. c. 16. § 8. in any *Action* brought in any of the Courts of Record at *Westminster*, where it shall *appear to the Court* that it will be *proper and necessary* that the Jurors should have a View, They may Order *special Writs of Distringas or Habeas Corpora* to issue, commanding the Sheriff to have Six OF THE FIRST TWELVE of the Jurors therein named, or some greater Number of them at the Place in question &c: And the Sheriff shall, by a *special Return*, certify "That a View
" has been had."

And by 3 G. 2. c. 25. (the Balloting-Act) § 14. it is provided "That where a View shall be allowed, Six of the Jurors named in the Pannel, or more, shall have the View, and shall be the first sworn, (or Such of them as appear,) before any Drawing."

But as the having a View was *not*, by either of these Statutes, made a Matter of Course, (though such a Practice had prevailed, and had been abused to the Purposes of Delay,) The Court thought it their Duty to take Care that their Ordering a View should not *obstruct Justice*, and prevent the Cause from being tried: And they resolved not to Order One any more, without a full Examination into the Propriety and Necessity of it; unless the Party praying it would come into such Terms as might prevent an *unfair Use* being made of it. For they were All clearly of Opinion, that the Act of Parliament meant "that a
" View should not be granted, unless the Court was satisfied that
" it was *proper and necessary*:" And they thought it better that a Cause should be tried upon a View had by any Six, or by fewer than Six, or even *without any View*, than be delayed for a great Length of Time. 252.

Accordingly, They added a Clause to the usual Rules for Views, purporting that the Party praying a View CONSENTED "That
" in Case *no* View should be had; or if a View should be had
" by any of the Jurors whomsoever, (though not being Six of
" the first Twelve;) yet the Trial should proceed, and no Ob-
" jection be made on Account thereof, or for Want of a *proper*
" Return." 256.

Since

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Since which, Motions for Views are become Motions of Course, with such additional Consent annexed to them. *Page 256.*
See the *Form* of the *usual* Rule, and also of the modern *Addition*, both in Causes to be tried by *Special* Juries, and those to be tried by *Common* Juries, respectively recited *verbatim*. 257, 258.

Visitor.

The general Power of Visitation, properly exercised, is *useful and convenient to Colleges*: *Per* *Ld. Mansfield*. 200.

The Jurisdiction of the Visitor is *summary* and *without Appeal* from it. 200.

The Founder of a College may appoint a Visitor, either *generally*, or *specially*. 200.

He may prescribe *particular Modes and Manners*, as to Part. *Ibid.*

He may appoint a *Special* Visitor, for a *particular Purpose*, and *no farther*. *Ibid.*

His *general* Visitor has incidental Power, *as such*: But yet he may *restrain* him as to *particular Instances*. *Ibid.*

No *technical* Form of Words is necessary for appointing either a *general* or a *special* Visitor. *Ibid.* and 202, 205.

But it must be collected from the *whole Purview* of the Statutes considered together, *WHAT Power* the Founder *meant* to give the Visitor. *Ibid.*

The Founder may make a *general* Visitor; and yet appoint *inferior particular* Powers in Others, in the first Instance. *Ibid.*

Of *St. John's College Cambridge*—

1st. The *Bishop of Ely* is Visitor, as to the *Election of Fellows*; *Per* *Ld. Mansfield*; 201, 202.

And indeed *general* Visitor, *except as to altering the Statutes*. 201 to 205.

2dly. And of *Dr. Keton's ANNEXED Fellowships*, as well as of the Rest. *Ibid.*

Ingrafted or *annexed* Fellowships in Colleges, (though ingrafted by *Indenture*;) are to be considered as *Part of the OLD Foundation*, 204, 205.

And a Clause of *Distress*, given to a *third* Person, make no Difference: For that is no adequate Remedy *to the Fellow*, (and was given *diverso intuitu*;) nor ought to take away the *SPECIFIC Remedy*, from the Person injured. *Ibid.*

Mandamus to a Visitor, “to exercise his Power *over the Temporalities*, in a Dispute about the intermediate *Profits of a prebendal Stall*, during its Vacancy”—Denied. 567, 568. See *Mandamus*.

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For, a Visitor has *no such Jurisdiction*. It must be determined according to the Course of the *Law of the Land*; As it is a Litigation not only with the Members of the Body, but with *Executors and Administrators* of deceased Prebendaries; Over *whom*, the Visitor can have no Power Page 567, 568.

Will

OF a Married Woman. 432. See *Prohibition, Baron and Feme*.



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